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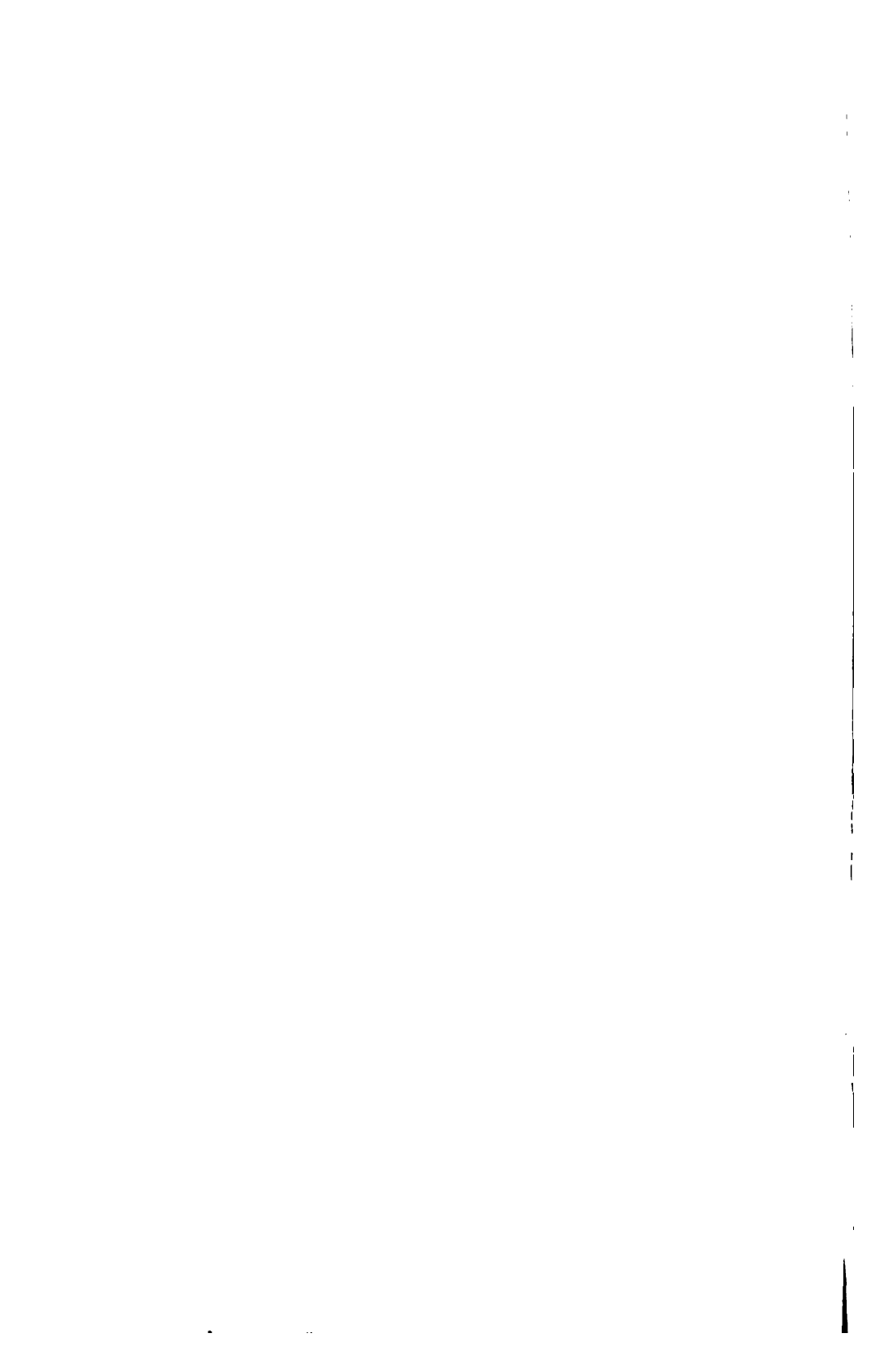
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REPORTS
OF
CRIMINAL LAW CASES,
WITH
Notes and References ;
CONTAINING, ALSO,
A VIEW OF THE CRIMINAL LAWS
OF THE
UNITED STATES.

BY JACOB D. WHEELER,
COUNSELLOR AT LAW.

VOL. II.

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Southern District of New York, ss.

BE IT REMEMBERED, that on the nineteenth day of August, in the forty-ninth year of the Independence of the United States of America, Gould & Banks, of the said District, have deposited in this office the title of a book, the right whereof they claim as Proprietors, in the words following, to wit:

"Reports of Criminal Law Cases, with Notes and References; containing, also, a View of the Criminal Laws of the United States. By Jacob D. Wheeler, Counsellor at Law."

IN CONFORMITY to the Act of Congress of the United States, entitled, "An Act for the encouragement of Learning by securing the copies of Maps, Charts and Books, to the Authors and Proprietors of such copies during the times therein mentioned." And also to an Act entitled "An Act supplementary to an act entitled An Act for the encouragement of Learning by securing the copies of Maps, Charts and Books to the Authors and Proprietors of such copies during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving and etching historical and other prints."

JAMES DILL,

Clerk of the Southern District of New York.

Rec. Oct. 28, 1873

TO THE PATRONS OF THIS WORK.

NOTWITHSTANDING I have detailed the plan of this work in the numbers as they have been issued from the press, and in the public journals, I cannot omit saying a word or two here, at the close of the second volume, in relation to it. My object is, to collect and publish every criminal trial that has occurred in the United States, making a complete collection of **AMERICAN STATE TRIALS**. They will contain trials in full, decisions of the judges, state papers, legislative reports, &c., and every thing that can tend to throw light upon, or elucidate the criminal jurisprudence of our country. They will, in most instances, be published entire; and if all the cases, &c. can be collected, (and I have not the least doubt, from the mass of matter already in my possession, they can,) it is difficult to conceive a publication of greater importance, in a national point of view, than such a collection would be; nor of one more useful to those gentlemen engaged in the practice of the criminal law.

To make the work still more valuable, the cases hereafter will be set up in type similar to that of the preface in this volume: by that means a much greater quantity of matter will be printed on a page, without any additional expense to subscribers. It is also contemplated to

add to each volume, in the form of an appendix, the forms used in criminal proceedings in the United States. They will be printed with the greatest care and accuracy.

I hope the preface to this volume will be found useful as a reference, &c. The acts of congress have been copied verbatim, and the construction given to them by courts of justice, follow, each in their order : so that the reader will have before him the statutes of the United States, and the adjudication of the courts upon them.

If it can aid the learned, who have not time to look into a great number of books for principles collected within the small compass of this preface ; or if it can assist those who are beginning their studies, and are at a loss for a connected and systematic view of the principles of criminal jurisprudence, I shall congratulate myself on being of some little service to those to whom I am always willing to be indebted ; and for the time, expense and trouble, (for really it has cost me not a little of either,) shall consider myself amply remunerated.

J. D. WHEELER.

New York, July 15th, 1824.

TABLE OF CASES

TO THE SECOND VOLUME.

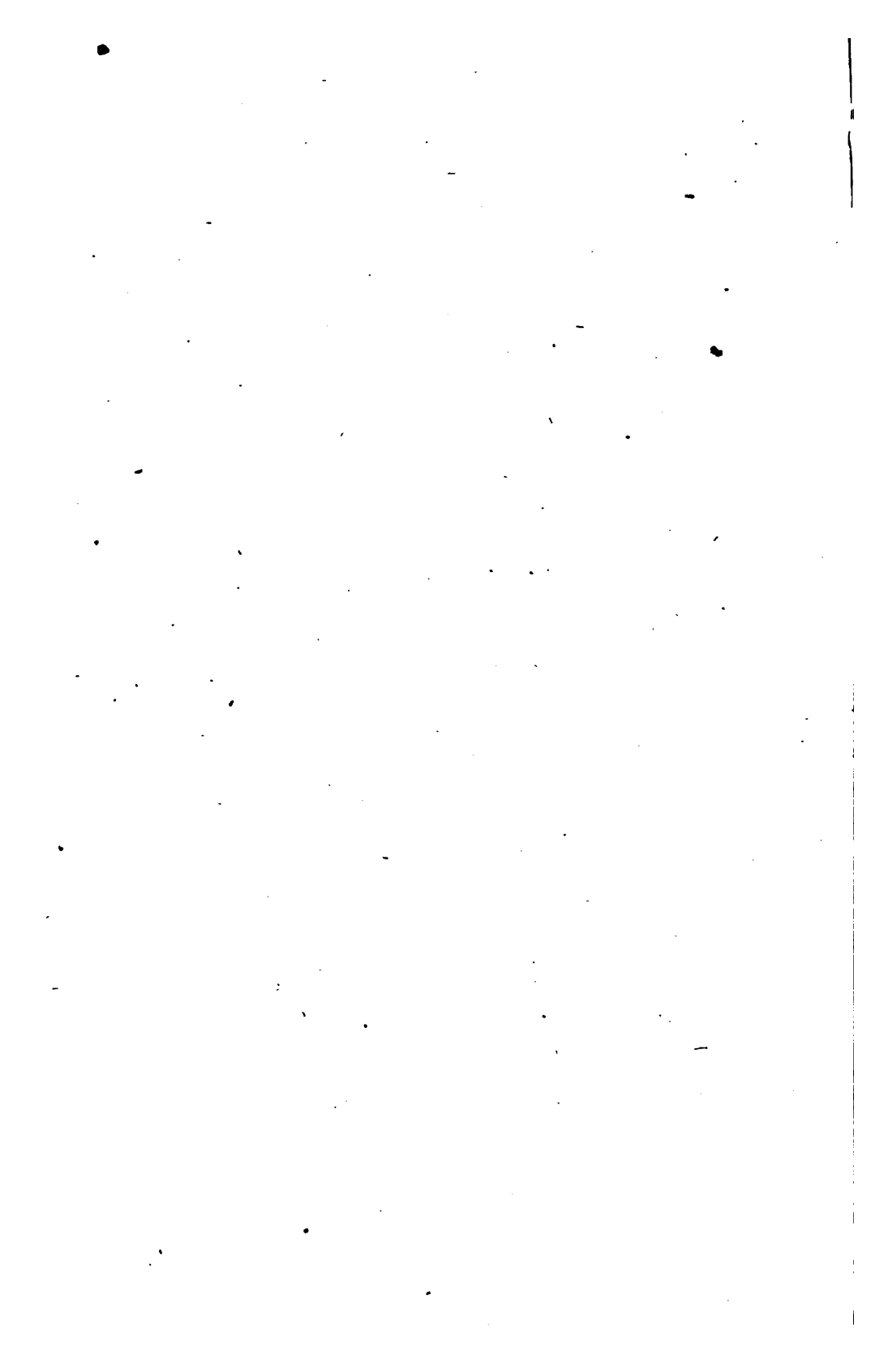
Almeida. <i>Habeas Corpus</i> ,	- - - -	576
Arndt and others. <i>Riot. Assault and battery</i> ,		236
Anderson. <i>Murder. Dying declarations</i> ,	-	290
Bainbridge. <i>Habeas Corpus</i> ,	- - - -	521
Barney. <i>Obstructing the Mail, &c.</i>	- -	513
Buckingham. <i>Libel</i> ,	- - - -	181
Burr. <i>Misdemeanor</i> ,	- - - -	573
Boyer et al. <i>Conspiracy</i> ,	- - - -	140
Barker. <i>Misdemeanor</i> ,	- - - -	19
Bowen. <i>Murder</i> ,	- - - -	226
Bleeker et al. <i>Conspiracy</i> ,	- - - -	256
Buckingham. <i>Libel. Truth, when a justification</i> ,		428
Campbell. <i>Information</i> ,	- - - -	555
Chapels et al. <i>Piracy</i> ,	- - - -	205
Croucher. <i>Rape</i> ,	- - - -	42
Deacon. <i>Habeas Corpus. Pennsylvania</i> ,	-	1
Deliesseleine. <i>Habeas Corpus. Homine Replegiando</i> ,		56
Degey. <i>Disturbing Divine Service</i> ,	- -	135
Dalton. <i>False Pretences</i> ,	- - - -	161
Dormenon. <i>In the Matter of</i> ,	- - - -	344
Duane. <i>Libel. Good behavior</i> ,	- - - -	533

Frazier et al. <i>Burglary</i> ,	- - - - -	55
Fuller. <i>Murder</i> ,	- - - - -	223
French. <i>Larceny</i> ,	- - - - -	259
Garretson et al. <i>Murder</i> ,	- - - - -	347
Gantier. <i>Misdemeanor</i> ,	- - - - -	77
Gourlay. <i>Murder</i> ,	- - - - -	102
Hunt. <i>Appeal</i> ,	- - - - -	139
Hare. <i>Robbery of the Mail, &c.</i>	- - - - -	283
How. <i>Murder. Circumstantial Evidence</i> ,	- - - - -	412
Hodges. <i>Treason. Intent</i> ,	- - - - -	477
Hutchins. <i>Piracy</i> ,	- - - - -	543
Jones. <i>Murder, Witness, Pardon, &c.</i>	- - - - -	451
Johnson. <i>Murder, Confession, &c.</i>	- - - - -	361
Jackson et al. <i>Grand Larceny</i> ,	- - - - -	253
Judah. <i>Libel</i> ,	- - - - -	26
Jewett. <i>Libel</i> ,	- - - - -	592
Kossloff. <i>Law of Nations</i> ,	- - - - -	622
Levy. <i>Misdemeanor</i> ,	- - - - -	245
Lent. <i>Jurisdiction</i> ,	- - - - -	548
Marley. <i>Misdemeanor</i> ,	- - - - -	74
Maria and cargo. <i>Salvage</i> ,	- - - - -	600
Meade. <i>Motion to discharge under Habeas Corpus</i> ,	- - - - -	569
Melvin et al. <i>Conspiracy</i> ,	- - - - -	262
Morris. <i>Libel</i> ,	- - - - -	464
Mitchell. <i>Murder</i> ,	- - - - -	471
Owen. <i>Murder</i> ,	- - - - -	260
Perez. <i>Piracy</i> ,	- - - - -	96
Pomeroy. <i>Counterfeit Notes</i> ,	- - - - -	159
Rankin. <i>Murder, Confession</i> ,	- - - - -	467

TABLE OF CASES.

vii

Rhodes, <i>ex parte Habeas Corpus</i> ,	- - -	559
Ryan. <i>Murder</i> ,	- - -	47
Robinson. <i>Petit Larceny</i> ,	- - -	240
Rood. <i>Habeas Corpus</i> ,	- - -	541
Row. <i>Jurisdiction</i> ,	- - -	607
Schooner <i>Conception</i> .	- - -	597
Sloop <i>Pitt</i> ,	- - -	602
Smith. <i>Murder</i> ,	- - -	79
Stamford. <i>Assault, with attempt to commit a Rape</i> ,		152
Skinner. <i>Motion to discharge</i> ,	- - -	232
Susan. <i>A Woman of Colour. Fugitive</i> ,	-	594
Tracy. <i>Libel</i> ,	- - -	358
Tilton. <i>False Pretences</i> ,	- - -	251
Tuhi. <i>Murder</i> ,	- - -	242
Turner. <i>Habeas Corpus</i> ,	- - -	615
Thompson. <i>Malicious Stabbing, discharge of a jury</i> ,		473
Travers. <i>Murder</i> ,	- - -	490
Thurston. <i>Nuisance</i> ,	- - -	518
Turner. <i>Habeas Corpus</i> ,	- - -	615
Wood. <i>Aiding and abetting in the robbery of the Mail</i> .		325
Williams. <i>Murder</i> ,	- - -	153
Ward. <i>Manslaughter</i> ,	- - -	122
Wentworth <i>et al. Larceny</i> .	- - -	511



PREFACE

TO

THE SECOND VOLUME.

HAVING completed the second volume of Criminal Law Cases, with apparent satisfaction to the profession, (of which my greatest pride is to be considered a member, although an humble one,) I have thought it might be useful, particularly to the young student, who is desirous of becoming acquainted with criminal jurisprudence, to introduce these cases to his notice, by a short and succinct view of the criminal laws of our country.

The importance of an accurate knowledge of criminal law has never been disputed; but the difficulty of obtaining it has often been acknowledged. The humiliating fact, that we are almost entirely indebted to English cases and decisions on this branch of the law cannot be denied. The evils which must result from such a system are altogether incalculable. The criminal jurisprudence of a republic must, of course, vary most essentially from that of a country governed on monarchical principles; and we will venture to affirm, that no kingdom on earth presents to the American jurist a chain of precedents calculated to produce an enlarged, correct, and enlightened view of the criminal code of the United States.—For this we are to look to our own courts and our own adjudications. The civil jurisprudence of our country is its greatest ornament. In most of the states of the Union, eminent professional gentlemen have been selected to report the proceedings of their courts of justice. Voluminous reports have been made: many with great accuracy and learning; altogether forming a body of law as creditable to themselves, as useful to their country. But from these reports, criminal trials and decisions are almost entirely excluded. This is owing to the circumstance, that trials of this nature do not take place (with but few exceptions) in the supreme courts of the respective states, but at the circuits and courts of oyer and terminer, and sessions, &c. Some few, indeed, are removed into the supreme court, where merely the law argument is reported; in other states the appeal lies directly to the legislature, and the case thereby entirely escapes the attention of the reporter. The consequence has been, that few reported trials of a criminal nature are to be found in the United States. To supply this deficiency, these reports have been undertaken, and they will be continued until all the cases are collected and published, if the same support is offered that the work has hitherto received.

This work is designed to bring together, in a few volumes, all the criminal cases that have occurred in this country since the revolution, making together a complete body of American State Trials. Of the importance of this publication, perhaps I ought not to speak. It is designed for gentlemen who are able and willing to judge for themselves. Many of them have expressed their astonishment to me that no attempt has been made to collect them before; and that they are much gratified that exertions are now made to rescue from oblivion, criminal trials which, in their day, agitated the community, and called forth the talents of the first men of the age.

Having said thus much in reference to the work itself, I proceed to a short analysis of the criminal laws of the United States.

Crimes.

A crime is an act committed or omitted, in violation of the public laws, either forbidding or commanding it. 4 Blac. Com. 5.

2 Hawk. P. C. In the early ages of society, crimes were defined and punished ch. 23. Spenser's State of Ireland. p. 1513. by the party injured, or by his relatives. His Law Tracts, chapter 1. See also, 4 Blac. Com. 313. relative to appeals, which evidently grew out of the right of the suffering party, or his relatives, to redress the injury. In the very early periods of society, those actions, even the most atrocious, which are now viewed and prosecuted solely as crimes against the state, were considered and resented merely as private injuries. In those ages, the conceptions of men were too crude to consider an injury done to an individual, as a crime committed against the public; they viewed it only as a prejudice to the party, or the relations of the party, who were immediately affected. The privilege of resenting private injuries, in the opinion of a very ingenious writer on the History of the Criminal Law, was that private right which was the latest of being surrendered to society. An improvement in government so opposite to a strong propensity of human nature, could not have been instantaneous. The progressive steps, leading to its completion, were slow and almost imperceptible. 3 Wils. 7.

As society progressed in the improvements of art and science, it was found as inconvenient as it was dangerous to entrust this power into the hands of individuals. It was found, that although the crime might be correctly defined, the punishment was often tyrannical and arbitrary. It was found, that when the definition of the crime and its punishment depended more upon the passions and feelings of the party injured, or his relatives, than upon any settled rule of law, punishment could neither be certain or equal.

Necessity, the rule of definition and punishment.

Necessity, therefore, compelled the sovereign power not only to explain and define the crime, but to apportion the punishment. Necessity is a rule to determine what act is a crime, and what kind and degree of punishment ought to be inflicted upon a delinquent for the commission of it. "Every act of authority," says Beccaria, "of one man over another, for which there is not an absolute necessity, is tyrannical. It is upon this, then, that the sovereign's right to punish crimes is founded; that is, upon the neces-

sity of defending the liberty of all entrusted to his care, from the usurpation of individuals; and punishments are just, in proportion as the liberty preserved by the sovereign is sacred and valuable."

The sources of crime may be found in the nature of the human species, and in the organization of society. The operation of the passions, (viz. pride, envy, hatred, malice, ambition, anger, lust, revenge, &c.) upon the conduct of individuals, are fruitful sources of crime of every dye. The passions being part of our nature, are injurious only when carried to excess. It is the business of the legislature not to exterminate, but to modify them by education, that the effects, from their irregularity and violence, may be avoided. Education is to the individual what good laws are to the whole community. "When the government is most just and equal, the citizens will be most virtuous, and, consequently, most happy. As we remove the causes which inflame pride, envy, ambition, &c. we prevent the consequences of them—treachery, rapine, and slaughter."

Sources of Crime.

The difference in the situation and condition of individuals is another source of crime. Man can hardly bear a superior. Notwithstanding nature and society have pointed out a pre-eminence among the human species, yet mankind are ever persuading themselves that the disproportion is merely accidental and unjust. "There is," says Dagge, in his considerations on criminal law, p. 158. "in human nature a restless spirit of competition, which begets in men a design of equal distinction and power with others exalted above them; and they conceive that an addition of riches and authority will afford them an increase of happiness. Under these circumstances, should urgent necessity instigate the wretched to injustice, may it not be asked, whether their crimes are not, in some measure, the natural consequences of their unequal lot in society?" These reflections cannot apply with much force to this country. The happy equality which prevails among the citizens of the United States is such as to afford the patriot and legislator the best assurance of the efficacy of mild laws and moderate punishments.

Writers on criminal law have all complained of the arrangement in the degrees of crimes and punishments. They insist that crimes against religion and morals should be first considered; as religion and morality are the foundation of all law.

Degrees of Crime.

Puffendorf and Montesquieu make the following syllabus of crimes:

- 1st. Those which directly tend to dishonour the Supreme Being.
- 2d. Those which are offensive to society—against morality, &c.
- 3d. Crimes against individuals—affecting life or member.
- 4th. Crimes against private families, of which matrimony is the support—adultery, &c.
- 5th. Crimes against the fame and reputation of individuals.

We have reversed this order. And it must be acknowledged to be extremely difficult to fix a standard by which crimes can be measured in the municipal laws of any country. There has been a great diversity of sentiment among jurists upon this subject. The conclusion of the majority of them seems to have been, that all crimes are to be estimated according to the mischiefs which they produce

in civil society. Those desirous of looking into this subject, may consult Paley, 291, 292. Bacc. on Crimes, 78. Eden. 10. 12. Dagge, 335. 343. 4 Blac. Com. 41.

Punishment. The principal object of punishment being to deter others from offending, it is the right and duty of government to punish crimes. But the sovereign power has no right to take away the life of a fellow being for slight offences. The following axioms, in criminal jurisprudence, may be laid down with some degree of certainty.

1st. The degree of punishment should be moderate, or at least not above the crime.

2d. Punishment should immediately follow the crime.

3d. Punishment should be certain.

1st. Should be moderate.

By a reference to the greatest part of the criminal codes on the continent of Europe, we shall find them merciless and sanguinary. They create an aversion to the law, and a contempt for the administrators of it. Can laws which are a natural and a just object of aversion receive a cheerful obedience, or secure a regular and uniform execution? The expectation is forbidden by some of the strongest principles in the human heart. Such laws, while they excite the compassion of society for those who suffer, rouse its indignation against those who are active in the steps preparatory to their sufferings. 3 Wils. Lec. 358.

If punishments be very severe, men are led to the perpetration of other crimes, to avoid the punishment due to the first. In countries and times most notorious for severity of punishments, were always those in which the most bloody and inhuman actions, and the most atrocious crimes, were committed; for the hand of the legislator and the assassin were directed by the same spirit of ferocity; which, on the throne, dictated laws of iron to slaves and savages, and, in private, instigated the subject to sacrifice one tyrant to make room for another. It is an axiom in criminal jurisprudence, invariably fixed by the improvements of modern times, that a punishment, to produce the effect required, it is sufficient that the *evil* it occasions should exceed the *good* expected from the crime; including in the calculation the certainty of the punishment, and the privation of the expected advantage. All severity beyond this is superfluous, and therefore tyrannical. The extent and degrees of punishment are marked out with accuracy and judgment by Mr. Bentham, in his "Théorie des Peines et des Recompenses." The analysis of it may be seen in the Edinburgh Review, No. 43.

He says, "The next subject for discussion, comprehends the principles that ought to regulate the extent of punishment for the prevention of crimes. These are contained in the following propositions.

"1st. The evil of the punishment must exceed the advantage arising from the crime; so that, generally speaking, the stronger the temptation to commit any crime, the more severe ought to be the punishment, subject to exceptions in extreme cases.

"2d. When the criminal act is evidently a habit or practice, the punishment should be proportioned, not to the gain derived from a

single offence, but to the probable amount of profit flowing from a course of such conduct.

"3d. An addition must be made to the punishment, in order to compensate its want of certainty and proximity.

"4th. In cases where a temptation offers for the commission of different crimes, a more severe punishment should be denounced against the greater crime.

"5th. The more pernicious any crime is, the more safely may a severe punishment be ventured upon, for the chance of preventing it.

"6th. The nominal amount of punishment for the same crime, must often be varied at the discretion of the judge, according to the circumstances of the delinquent, in order to preserve the real amount of suffering."

The operation of sanguinary laws, instead of preventing crime, increases it. The party injured will not prosecute when he is sure public sentiment and his own feelings are against excessive punishment. If he should bring the party to trial, the jury, who may have more feeling than himself, will, upon the ground of humanity or law, acquit him, and this, perhaps, at the expense of their oaths. If the prisoner is convicted, with what eagerness and avidity do not the judges find some technical exception, in order to arrest the arm of the law. If that, too, fails, the force of public opinion is, in many cases, sufficient to rescue him from a situation the laws of his country have placed him in.

"It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws, (beside the doubt that may be entertained concerning the right of making them,) do likewise prove a manifest defect, either in the wisdom of the legislature, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium* to every case of difficulty." 4 Blac. Com. 16.

By the 10th art. of the amendment of the constitution of the United States, it is declared, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The cruel and barbarous punishments of burning, beheading, quartering, impaling, burning in the hand, corruption of blood, &c. do not exist in the United States. The imperfection and cruelty of former systems were known and considered by those great and good men, who laid the foundation upon which has been erected the superstructure of our criminal code. Here, the punishment is tempered with mercy, but, at the same time, graduated by the enormity of the crime. And by an act, passed 8th May, 1798, sec. 32, it is declared, "The manner of inflicting the punishment of death, shall be by hanging the person convicted, by the neck, until dead." And also by the act of 30th of April, 1790, sec. 4., it is enacted, "The court before whom any person shall be convicted of the crime of murder, for which he or she shall be sentenced to suffer death, may, at their discretion, add to the judgment, that the body of such offender shall be delivered to a surgeon for dissection; and the marshal, who is to cause such sentence to be executed, shall

accordingly deliver the body of such offender, after execution done, to such surgeon as the court shall direct, for the purpose aforesaid. Provided, That such surgeon, or some other person by him appointed for the purpose, shall attend to receive and take away the dead body, at the time of the execution of such offender."

For the grades of punishment, see the different crimes, post.

2d. Should immediately follow the crime. All writers on criminal law agree that a crime should immediately be followed by trial and punishment, because the smaller the interval of time between the punishment and the crime, the stronger and more lasting will be the association of the two ideas of *crime* and *punishment*, so that they may be considered, one as the cause, and the other as the inevitable and unavoidable effect which follows. In the rude minds of the vulgar, nothing is effective but present objects; they see the punishment, but forget the crime when a long interval ensues between them. It is of the greatest importance (says Beccaria) that the punishment should succeed the crime as immediately as possible, if we intend that in the rude minds of the multitude, the seducing picture of the advantage arising from the crime, should instantly awake the attendant idea of punishment. Delaying the punishment serves only to separate these two ideas; and thus affects the minds of the spectators, rather as being a terrible sight, than the necessary consequence of a crime; the horror of which should contribute to heighten the idea of the punishment.

There are, besides, other reasons to show the necessity of a speedy trial and punishment. It excuses the unhappy criminal the cruel and unnecessary torment of uncertainty; which is a punishment of itself, and to those of a strong imagination, the greatest punishment perhaps that can be endured. Imprisonment, being the only means of securing the person of the accused, until he be tried, condemned, or acquitted, ought not only to be of as short duration, but attended with as little severity as possible. The time should be determined by the necessary preparation for the trial, and the right of priority in the oldest prisoners. The confinement ought not to be closer than is requisite to prevent his flight, or his concealing the proofs of the crime; and the trial should be conducted with all possible expedition. Can there be a more cruel contrast than that between the indolence of a judge, and the painful anxiety of the accused; the comforts and pleasures of an insensible magistrate, and the filth and misery of the prisoner?

"The degree of punishment, and the consequences of a crime, ought to be so contrived as to have the greatest possible effect on others, with the least possible gain to the delinquent; if there be any society in which this is not a fundamental principle, it is an unlawful society; for mankind, by their union, originally intended to subject themselves to the least evils possible."—Becc. c. 7. "That a punishment may not be an act of violence, of one or of many against a private member of society, it should be public, immediately, and necessary; the least possible in the case given, proportioned to the crime, and determined by the laws." Montesquieu, Spirit of Laws, b. 6 c. 13.

3d. Should be certain. The certainty of punishment is that quality which is of the greatest importance, in order to constitute them fit preventives of crimes.

This quality is, in its operation, most merciful, as well as most powerful. When a criminal determines on the commission of a crime, he is not so much influenced by the lenity of the punishment, as by the expectation, that, in some way or other, he may be fortunate enough to avoid it. This is particularly the case with him, when this expectation is cherished by examples, or by experience of impunity. 3 Wils. Lec. 363.

The pardoning power is the brightest jewel in the crown of the executive; its brightness may, however, be tarnished by too frequent and improvident use. If the certainty of punishment is one of the greatest preventives of crimes, may not the means of prevention be very much diminished, if not almost entirely destroyed, by an indiscriminate use of this power, is a question that will not be answered in the negative. Perhaps there is no power placed in the hands of a man, or a body of men, that requires greater caution and circumspection in the exercise of it, than the power of pardoning. When duly administered, it may soften the rigour of law. It meets cases and exceptions not provided for by any general rule; but when abused, the rule and the exception are confounded, and the law itself becomes a dead letter.

There is nothing very dissimilar here in the *mode* of trial of those charged with crimes from the English *forms*, which we have adopted in the United States. We have, however, made some improvements in favour of the party accused, which justly entitles our criminal code to the respect and esteem of every nation. Perhaps there is no country on the face of the earth where a person charged with a crime is less subject to arbitrary power, where his rights in a peculiar situation are so cautiously guarded.

A prisoner can only be brought to trial by the ordinary course of Presentment a presentment or indictment. By the constitution, (art. 5th, amend- and indict-
ments,) it is declared, "No person shall be held to answer for a ment the only
capital or other infamous crime, unless on a presentment or indict- mode of pro-
ment of a grand jury, except in cases arising in the land or naval secution in the
forces, or in the militia, when in actual service, in time of war or United States.
public danger; nor shall any person be subject for the same offence,
to be twice put in jeopardy of life or limb; nor shall be compelled,
in any criminal case, to be a witness against himself, nor be deprived
of life, liberty, or property, without due process of law; nor shall
private property be taken for public use without just compensa-
tion."

To convict a person of a crime under the constitution and laws of the United States, (except as is there excepted,) the preliminary investigation and decision of a grand jury is indispensably requisite. A grand jury is a barrier that protects the rights of the people, and which cannot be invaded until that barrier is broken down.

—"Nor shall any person be subject for the same offence to be Jeopardy,
twice put in jeopardy of life or limb." See the construction of this
phrase in the constitution, in Goodwin's Trial, by Counsellor Samp-
son. See also, 1 Cr. L. Cases, 471. The decision of Chief

Justice Spencer on the legal meaning of the word jeopardy, under this constitutional provision, was recognized by the Supreme Court of the United States, in *Perez's case* for piracy, Feb. Term, 1824.

Place of Trial.

By the amendments of the constitution, art. 6th, "In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence." See the 29th sec. of the act of congress, Sept. 24, 1798; the 8th sec. of the act of 30th April, 1790.

If a tribunal for the trial of an offence exist where the prisoner was seized, such tribunal has jurisdiction, and he cannot be transported to a different district for trial. *Bollman and Swartwout* were seized in the territory of Orleans, on a charge of high treason, committed in that territory or neighbourhood, and transported to the District of Columbia for trial; it not being alleged that any offence was committed in the District of Columbia, it was held that the circuit of the District of Columbia had not jurisdiction. 4 Cranch, 135.

Impartial Jury

Under the provisions of the constitution and laws. (Const. art. 6. amendt.; Act of Congress, Sept. 24th, 1789, sec. 29; Act of Congress, May 13th, 1800,) and of the common law, requiring an impartial jury in criminal cases, those who have deliberately formed and delivered an opinion, that the party is guilty of the crime charged against him, are disqualified to serve as jurors. Having formed an opinion of any fact conducive to the final decision of the case, would not disqualify. But of the opinion formed be on a point so essential as to go far towards a decision of the whole case, and to have a real influence on the verdict, it seems it would disqualify. Thus, on a charge of treason, it seems it would not be a sufficient objection to a juror that he did believe, and had said, that the prisoner, at a time considerably anterior to the fact charged in the indictment, entertained treasonable designs against the United States. But if he had made up, and declared the opinion, that to the time when the fact laid in the indictment is said to have been committed, the prisoner was prosecuting the treasonable design with which he is charged, it is a sufficient cause of challenge. So, in homicide, whether the fact of killing is admitted or is doubtful, if a juror should have made up and delivered an opinion, that though uninformed as to the fact of killing, he was confident of the malice—he was confident the prisoner had deliberately formed the intention of murdering the deceased, and was prosecuting that intention up to the time of his death, it seems it would be a sufficient cause of challenge. So, on the charge of passing counterfeit bank notes, knowing them to be counterfeit, if the juror had declared, that though uncertain as to the fact of passing the notes, he was confident the prisoner knew them to be counterfeit, it would be a sufficient objection. (*United States v. Burr*, 416, 417, 418.) Where, however, the character charged, and the circumstances, are so univer-

sally notorious that it is obviously and totally impossible to obtain a jury whose minds are not already made up, perhaps the rule may be relaxed, so far as necessity requires. But if this necessity does not exist, the rule will be adhered to. *Ibid.* 419. *Sergt. Comst. Law*, p. 253.

After a juror is sworn, it is too late to object that he belonged to another county. And if a juror be challenged for favor, and upon examination before the triors, he declare, that if the evidence should be equal, he would give a verdict in favor of the party upon whom the burden of proof lies, the court, in its discretion, ought to reject him as a juror. 7 Cranch, 290.

If a person is put upon the panel of the grand jury, and process served upon him, his name cannot be erased from the panel by the marshal, nor can he substitute another in his place. If another person is substituted, the first will be entitled to take his seat on the grand jury. The regularity of summoning a grand jury may be excepted to before they are sworn. *Burr's Trial*, 37. And a juror cannot be compelled to be a witness to prove his own incompetency; he may, however, if he chooses. 3 Dall. 515.

It is of vital importance to the correct administration of justice, and the fair decision of any case, that the jury should, in the language of the constitution, be impartial. Various decisions have been made in the different states upon this subject. In *Milligan and Welchman's case*, which was a charge of robbing the *Phoenix Bank*, New York General Sessions, Nov. 1821, before the Hon. Richard Riker, Recorder, (6 City Hall Rec. 71.) after a long discussion and argument, the following interrogatories were framed and put to each juror:—1st. Have you at any time formed or expressed an opinion, or even entertained an impression, which may influence your conduct as a juror? 2d. Have you any bias or prejudice on your mind, for or against the prisoners? 3d. Do you, in every respect, according to the best of your knowledge or belief, stand perfectly indifferent between the people and the prisoners? These interrogatories, after argument, were adopted and put in *Johnson's case*, (see p. 361.) The authorities upon this subject are collected p. 265.

Interrogatories to jurors.

By the 4th art. of the amendments to the constitution, it is declared, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, or the person or things to be seized."

Warrants.

The manner of obtaining a warrant against a person charged with a crime, is pointed out by the 33d sec. of the act of Sept. 24, 1789. The act directs that the warrant may issue, and the party be arrested, agreeably to the usual mode adopted in the state in which the proceedings are had. A process to arrest, obtained without a previous oath or affirmation, of at least probable cause, is illegal and void, both at common law and under the constitution and laws of the United States.

To warrant a commitment, that proof would not be required Commitment.

which would be necessary to convict the person on a trial in chief; but the committing magistrate would require that probable cause should be shown, and that must be made out by proof, inducing a belief that the crime alleged has been committed by the person charged. *Burr's Trial*, by Robinson, 80. A warrant of commitment is illegal which does not state some good cause certain, supported by oath. 3 Cranch, 447. *Sergt. Const. Law*, 240.

Surety of the Peace.

By the first section of the act of 16th July, 1798, "The judges of the supreme court and of the several district courts of the United States, and all judges and justices of the courts of the several states having authority, by the laws of the United States, to take cognizance of offences against the constitution and laws thereof, shall, respectively, have the like power and authority to hold to security of the peace, and good behavior, in cases arising under the constitution and laws of the United States, as may or can be lawfully exercised by any judge or justice of the peace of the respective states, in cases cognizable before them." See *Sergt. Const. Law*, 249. See, also, *Duane's case*, p. 583.

Copy of indictment and list of jury and witnesses.

For the construction of the above section, see the *United States v. The Insurgents of Pennsylvania*, 2 Dall. 335. to 342; and *Hare's case* for robbing the mail, *Baltimore, May*, 1818, p. 283.

By the 28th section of the act of 30th April, 1790, it is enacted, "That any person who shall be accused and indicted of treason, shall have a copy of the indictment, and a list of the jury, and witnesses to be produced on the trial for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors, delivered unto him at least three entire days before he shall be tried for the same; and in other capital offences, shall have such copy of the indictment and list of the jury, two entire days, at least, before the trial."

A reasonable time will be allowed by the court, after a list of the names of the witnesses are furnished to the prisoners, for the purpose of bringing testimony from the country or place in which these witnesses reside, although it should exceed three days mentioned in the above section. *Sergt. Const. Law*, 255. *United States v. Stewart*, 2 Dall. 343. See post.

The township in which the jurors and witnesses reside, as well as the county and state, should be specified: but the act of congress does not require a specification of their occupations, and, therefore, is not necessary. *United States v. Insurgents*, 2 Dall. 335.

Standing mute, challenge of jury, &c.
Judgment of *peine forte et dure* cannot be given in the U. States. p. 301.

By the 29th section of the act of 30th April, 1790, it is declared, "If any person or persons be indicted of treason against the United States, and shall stand mute, or refuse to plead, or shall challenge peremptorily above the number of thirty-five of the jury; or if any person or persons be indicted of any other of the offences herein before set forth, for which the punishment is declared to be death; if he or they shall also stand mute, or will not answer to the indictment, or challenge peremptorily above the number of twenty persons of the jury, the court, in any of the cases aforesaid, shall, notwithstanding, proceed to the trial of the person or persons so standing mute or challenging, as if he or they had pleaded not guilty, and render judgment thereon accordingly."

In murder and other crimes (except treason) set forth in this act,

the prisoner can challenge only twenty; but in offences created since that act, where the penalty is death, the prisoner is entitled to challenge thirty-five, as at common law. The words, "herein before set forth," confine the provision to the offences described in that act. *Sergt. Const. Law*, 252. 4. *Dall.* 414.

It was decided in the Circuit Court of the United States, Baltimore, May, 1818, (see p. 283) after a long and learned argument, that standing mute on a charge of felony against the laws of the United States, is equivalent to a plea of not guilty under the above section.

By the amendment to the constitution of the United States, (art. 8.) it is declared, "excessive bail shall not be required."

By the act of congress, Sept. 24, 1789—"For any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States courts, where he may be found, agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned, or bailed, as the case may be, for trial before such court of the United States, as, by this act, has cognizance of the offence. And copies of the process shall be returned as speedily as may be in the clerk's office of such court, together with the recognizance of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offender or the witnesses, shall be in the district other than that in which the offence is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which case, it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law. And if a person committed by a justice of the supreme, or a judge of a district court, for an offence not punishable with death, shall afterwards procure bail, and there be no judge of the United States in the district to take the same, it may be taken by any judge of the supreme or superior court of law in such state."

By an act of congress, passed March 2d, 1793, bail may be taken by any chancellor, judge of the supreme or superior court, or chief or first judge of a court of common pleas of any state, or mayor of a city, or either of them.

Although the above act of Sept. 24th, 1789, does not expressly invest the courts of the United States, sitting as courts, with the power to commit a person charged with an offence against the United States; yet this power is implied in the duties which the court

Arrest, bail,
and process of
removal.

must perform. And the court must take bail in such case. *Sergt. Const. Law*, 242.

The power of the court to commit for offences of which it has cognizance, is exercised by every court of criminal jurisdiction. Courts, as well as individual magistrates, are conservators of the peace. *Burr's Trial*, 81.

The supreme court has jurisdiction under the constitution and laws of the United States, to bail a person committed for trial on a criminal charge by a district judge. 3 *Dall.* 77.

Limitation of Prosecutions. By the act of March 26th, 1804, breaches of the revenue laws may be punished by fine or forfeiture, &c. within five years after committing the offence.

It is declared by an act of congress, passed 3d May, 1798, s. 31. that "No person or persons shall be prosecuted, tried or punished for treason or other capital offence aforesaid, wilful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offence aforesaid shall be done or committed; nor shall any person be prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture, under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid. Provided, that nothing herein contained, shall extend to any person fleeing from justice."

Courts of the United States have not common law jurisdiction in criminal cases

It is now, I believe, considered as settled, that the courts of the United States have not cognizance of crimes and offences at common law. Before criminal jurisdiction can be exercised, congress must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence. *Sergt. Const. Law*, 264. A different doctrine was a long time held to be law. In *Gideon Henfield's case*, tried before Justice Wilson, at Philadelphia, July, 1793, the common law jurisdiction of the courts of the United States, was insisted upon. So, also, in the case of the *United States v. Ravara*, 2 *Dall.* 297., coram, Jay, C. J.; and the *United States v. Worrall*, 2 *Dall.* 384., and also in the case of the *United States v. Williams*, 1799, *Ellsworth*, C. J. decided in favour of the common law jurisdiction. A different decision has since prevailed in two cases.

In the case of the *United States v. Hudson and Goodwin*, 7 *Cranch*, 32. it was held, that an indictment at common law could not be sustained in the circuit court, for a libel on the president and congress of the United States. So, also, in the case of the *United States v. Coolidge*, 1 *Wheat.* 416. the judges certified against the jurisdiction.

Crimes against the United States depend, then, upon the statute law. It will, therefore, only be necessary to detail the several statutes, and the construction given to them by the courts of the United States, to exhibit a view of the criminal laws of the United States. I call it a *view*, because it is intended merely as a sketch for the benefit of those young men who have commenced their studies, and others, who are supposed to be ignorant of the subject, and who cannot find even a view in any book: and because, were I disposed to write a treatise, it would embrace the compass of a volume instead of a preface.

The trial and punishment of crimes against the United States, must take place, under the constitution and laws, in the supreme court,* the circuit court, or the district court of the United States. L. U. S. Sept. 24th, 1789.

The circuit court has exclusive jurisdiction of all crimes and offences which are cognizable under the authority of the United States, except when it shall be provided otherwise by law. They have also concurrent jurisdiction with the district courts, of the crimes and offences which are cognizable in those courts. 1 Gall. 177. 7 Cranch, 285.

By the act of September 24, 1798, sec. 11. the circuit court shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts, of the crimes and offences cognizable therein. See the construction of this act, 2 Dall. 297. 5 Wheat. 26. 29. 6 Wheat. 692. 5 Sergt. and Rawle, 545.

Circuit Court. The jurisdiction of the Circuit Court, in criminal cases, is confined to offences committed within the district in which the court sits, when committed on land, p. 325.

By the 9th section of the act of September 24th, 1789, the district court shall have, exclusively of the courts of the several states, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.

District Court.

It is, therefore, the grade of punishment alone that separates the jurisdiction of the district from that of the circuit courts; in other respects, their jurisdiction as vested by this act, is similar.

By the same section, the district court shall have jurisdiction, exclusively of the courts of the several states, of all suits against consuls or vice-consuls, except for offences above the description above mentioned. Here it is the character of the party, and the grade of punishment combined, that give jurisdiction. Sergt. Const. Law, 226.

Treason has always been considered as the greatest crime an individual could commit against the laws of the community of which he is a member; inasmuch as it strikes at the foundation of them. It is essential to the security and happiness of mankind that they should live under a government of some kind or other: and

Treason.

* By the act of September 24th, 1789, sec. 13., the supreme court has, "exclusively, all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise, consistently with the law of nations." No prosecution has taken place under this act since the organization of the government, and probably never will. The act of 20th April, 1790, declares any writ or process against an ambassador or other public minister, void; which would render a prosecution of no effect.

we see in all ages and in every country they have found it necessary to frame rules and regulations for the safety of all. These rules cannot be broken without endangering their lives. By a reference to the history of the world, it will appear that all nations have punished this crime with comparative severity. In every country it has been followed by the death, at least, of the offender. In many nations, the penalty on the commission of this crime, has been felt by the relatives of the offender in a remote degree.

It is unquestionably a great crime, involving the very existence of society; but it is nevertheless of extreme importance that the crime be accurately defined. The celebrated Montesquieu declares, that if the crime of treason be indeterminate, this alone is sufficient to make any government degenerate into arbitrary power. *Sp. L. b. 12. c. 7.* Blackstone observes, "as this is the highest civil crime which (considered as a member of the community) any man can possibly commit, it ought, therefore, to be most precisely ascertained." *4 Com. 75.*

Crime of, not defined.

The greatest precision and accuracy in the definition of this crime is necessary to insure the liberty of the people; but it has not been obtained. In ancient Rome and modern Europe, the most distressing uncertainty has prevailed. Witness the imperial constitutions of Arcadius and Honorius, which decree among other things, a mere assault upon a minister of the prince, treason. See the dreadful uncertainty in the common law of England in relation to the definition and punishment of treason, *Mirror, c. 1. s. 2. 1 Hale P. C. 80. Britton, c. 22. 4 Blac. Com. 75. and 76.* Judge Wilson observes, in point of precision and accuracy, with regard to this crime, the common law; it must be owned, was grossly deficient. Its description was uncertain and ambiguous, and its denunciation and penalties were wastefully communicated to offences of a different kind.

As the crime is dangerous to the existence of a state, so have the numerous imputations of it been to individuals. The best blood has been shed under definitions of this offence, too extended to be limited, and too fluctuating to be settled. Who cannot reckon up a host in the long and disgusting catalogue of convictions and executions in almost every kingdom in Europe for many centuries past? The peaceable, quiet citizen has been harassed by demagogues, courtiers, spies and informers, for capricious and constructive treasons in almost every country and age.

Has been in the U. States.

In the United States a salutary limit has been set to this dangerous state prerogative. A prerogative always formidable and sometimes destructive to the liberty and lives of the best citizens. In the United States the people are secure against the arbitrary construction of courts—against legislative tempests—against political factions.

By the constitution of the United States, art. 3. sect. 3., it is declared, that, "treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." This constitutional provision comprises all the cases of treason that can possibly arise in the United States.

It is difficult to pass an eulogium worthy the subject. The long catalogue of constructive and other treasons, which has successively disgraced and convulsed the British empire, are unknown in the United States, and can never be known under the above section.

It cannot but be matter of congratulation to the American citizen, that he is secure in life and property by the express provision in the constitution of his country. The constitution having marked out the limits of this crime, the legislature cannot extend it, nor can the judges extend it by arbitrary and capricious constructions.

Treason against the United States, shall consist only :

1st. "In levying war against them." The term "levying war" What acts amount to levying war. in the constitution of the United States is used in the same sense in which it is understood in England. It is a technical term, borrowed from the English law, and its meaning is the same as it is when used in the statute, 25. Edw. 3.; and is to be collected, as well from adjudged cases, as from the writings of approved elementary authors. It comprehends as well those who create or raise a war, as those who make it or carry it on. 4 Cranch, 471. It has been decided in the supreme court of the United States, 4 Cranch, 75. to 137. that to constitute a levying war, there must be an assemblage of persons, for the purpose of effecting, by force, a treasonable purpose; and when war is actually levied, all those who perform any part, *however minute*, and *however remote* from the scene of action, and who are *leagued* in the general conspiracy, are traitors. 4 Cranch, 76. Any assemblage of men, for the purpose of revolutionizing *by force* the government established by the United States, in *any of its territories*, although, as a step to, or the means of, executing some greater projects, amounts to *levying war*. 1b.

Meeting of particular *bodies of men*, and marching from places of *partial* to a place of general rendezvous, is such an assemblage as constitutes a levying war. 4 Cranch, 76. If an army be actually raised for the avowed purpose of carrying on open war against the United States, and subverting their government, a commissary of purchases, who never saw the army, but who, knowing its object, and leaguering himself with the rebel, supplies that army with provisions, is guilty of an overt act of levying war. 4 Cranch, 470. Where a body of men *are assembled* for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war. 4 Cranch, 475. Arms are not an indispensable requisite to *levying war*, nor the actual *application of force to the object*. 4 Cranch, 488. A man may be legally absent, who has counselled, or procured the treasonable act. 4 Cranch, 491. Levying war is an act compounded of law and fact, of which the jury, aided by the court, must judge. 4 Cranch, 506. Enlisting, or procuring any person to enlist in the service of the enemy, is an act of treason. 2 Dall. p. 86. Nothing will excuse the act of joining the enemy, but the fear of immediate death. *Ibid.*

Going with a party to the house of an excise officer, in arms, marshalled and arrayed, and committing other acts of violence and de-

vastation, with an intention to suppress the office of excise, and to compel the resignation of the excise officer, so as to render null and void, in effect, an act of Congress, is treason. 2 Dall. 246, 247.

What acts do not amount to levying war. If the war be levied, and the prisoner has performed a part, but is not leagued in the conspiracy, and has not appeared in arms against his country, he is not a traitor. 4 Cranch Rep. 533, 534. Nor is an assemblage of men with a treasonable design, not attended with warlike appearances, levying war. Ibid. Nor is it sufficient that the indictment state generally that the accused levied war: an *overt act* must be laid and proved. Burr's Trial, by Robinson. See, also, 4 Cranch, 533. The presence of the party at the scene of operation is actually, or constructively necessary, and is part of the overt act, and must be proved by two witnesses. Ibid. An indictment charging the prisoner with being present at an overt act, cannot be supported, by proving he caused the act to be done by others. No presumptive evidence; no facts from which presence can be inferred, will satisfy the constitution and law. 4 Cranch, 533. And by the same book it appears that if the overt act be not proved by two witnesses, all other testimony is irrelevant.

The travelling of individuals to a place of rendezvous, separately or *together*, but not in *military form*, is not levying war. The act must be unequivocal and have a warlike appearance. 4 Cranch, 75. and 137.

If the war be actually levied, if the accused has performed a part, but is *not leagued in the conspiracy*, and has *not appeared in arms* against his country, he is not a *traitor*. 4 Cranch, 474.

An assemblage of men with a treasonable design, but not in force, nor in the condition to attempt the design, nor attended with *warlike appearances*, does not constitute the fact of levying war. Ibid. 482. A conspiracy to levy war is not treason, even where they meet with a treasonable intent if not in force and in a warlike form. 4 Cranch, 126. To make such a meeting treason, it must be in force, and in a warlike posture. 4 Cranch, 475. An enlistment of men to serve against the government, is not treason by levying war.

The crime of treason should not be extended. It is more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases, and that crimes, not already within the constitutional definition should receive such punishment as the legislature, in its wisdom, may provide. 4 Cranch, 486. Treason is a breach of allegiance, and can be committed only by him who owes allegiance, perpetual or temporary.

A person can only be convicted of the overt act laid in the indictment. If other acts can be inquired into, it is only to prove the overt act charged. 4 Cranch, 534. And a person cannot be constructively present at an overt act of treason, unless he is *aiding and abetting at the fact, or ready to afford assistance, if necessary*. Ibid.

And if the overt act be advised, procured, or commanded by the accused, he is guilty accessorially, and not directly, as principal. 4 Cranch, 533.

By act of congress, 30th April, 1790, "If any person or persons No person owing allegiance to the United States of America, shall levy war shall be con- against them, or shall adhere to their enemies, giving them aid and victed of trea- comfort, within the United States or elsewhere, and shall be thereof son, unless on convicted on confession in open court, or on the testimony of two the testimony witnesses to the same overt act of treason, whereof he or they shall of two wit- stand indicted, such person or persons shall be adjudged guilty of nesses to the treason against the United States, and shall suffer death." same overt

In the construction of the above act, it has been decided, that if act, or on con- the overt act be not proved by *two witnesses*, so that the case may be fession in submitted to the jury, all other testimony is irrelevant. 4 Cranch, open court, 506, 507. If other acts can be introduced, it is only in the character of corroborative or confirmatory testimony, after the fact has been proved by two witnesses. Ibid. The presence of a party, where presence is necessary, must be proved by two witnesses; and if proof of procurement be admissible, upon a charge of presence, such procurement must be proved in the same manner, and by the same kind of testimony, as would be required to prove actual presence. 4 Cranch, 503. It was decided in Malin's case, 4 Dall, 33, that mistaking a corps of American troops for British, and going over to them as such, did not amount to treason; and that no evidence of words, spoken by the prisoner relative to the mistake could be admitted. In Carlisle's case, 1 Dall. Rep. 35., which was for treason, in taking and holding a commission from the king of Great Britain, to guard over the gates of the city of Philadelphia, the overt acts alleged were, the traitorously joining himself with others, in levying war against the state, joining the king's army, and giving intelligence, &c.; it was ruled by the court, that evidence that the prisoner had power to let people in and out of the city, when in possession of the enemy, ought to be received; but not as conclusive proof of his holding a commission under them: but evidence of his seizing salt, or disarming the Americans does not apply to that species of treason, though it may prove his having joined the armies of the enemy. And by the same case it was decided, that if an overt act has been proved where the indictment is laid, the prisoner's confession may be given in evidence to corroborate that proof. In M'Carty's case, 2 Dall. 86., who was charged with committing high treason, in levying war, the counsel for the United States offered to give in evidence the confession of the prisoner at the time of arraignment proved by two witnesses as proof of his guilt. But C. J. M'Kean would not receive it; but said it might be given to the jury in corroboration of any other evidence offered in support of the prosecution. On the trial of an indictment for treason in levying war, as the crime consists in the overt act of levying war, and the treasonable intention, evidence to either point is relevant; and the court will not prescribe to the attorney of the United States the order in which such evidence shall be given. He may first give evidence of the treasonable intention; but such intention means, the intention with which the overt act was committed, and relevant to the overt act; not a general evil disposition, or an intention to commit a distinct fact: the latter is admissible only by way of corroboration as to the intention, and, therefore, ought to follow what it is to corroborate. Ibid. Burr's Trial, 469. 472. Sergt.

Const. Law, 374. The overt act must be proved by two witnesses to have been committed within the district; and the actual or legal presence of the party, or the procurement by him, must be proved by two witnesses. 4 Cranch, 496. 503.

Prisoner has a right to be defended by counsel—to panel of jury—list of witnesses, &c.

At common law, a prisoner, on the trial of an indictment for treason or felony, was obliged to manage his defence as well as he could; he was not permitted the aid of counsel; and yet the right of being defended by counsel is a right founded and inherent in the condition and nature of man. It is a right extending to the minutest particulars of his life. Do we not constantly procure the advice and direction of those we know, or whom we suppose know how to protect our property better than ourselves? We do. In the most trifling controversy of one man with another, he calls in the aid of some one; and when he has confidence in his ability and integrity, is willing in some shape or other to be influenced by his opinion; but in a controversy between a single individual and the community, in which the life of that individual is at stake—a controversy so extremely calculated to put him in a situation of all others most perplexing, and least calculated of affording him the means of defence, that counsel should, at this time, when most needed, be refused, is one of those principles in law which it is easier to palliate than to justify. The common law of England does not allow a prisoner to defend his liberty or life by counsel!

Chitty (1 C. L. 331.) says, it seems to be universally agreed, that at common law, a prisoner was not entitled to defend by counsel, upon the general issue not guilty, on any indictment for treason or felony. This rule may appear somewhat strict and severe, as the crown has always the benefit of counsel to marshal its evidence, and state the case to the jury; but is, in some degree, attempted to be explained by the maxim, that the judge is to be counsel for the prisoner. It is his duty to see that all the proceedings are regular; to examine witnesses for the defendant; to advise him for his benefit; to hear his defence with patience; and, in general, to take care that he is neither irregularly nor unjustly convicted. Whereas, when counsel are allowed a prisoner, it is their business to see that he lose no advantage, and it is then only the duty of the judge to be indifferent between the king and the prisoner; and in prosecutions in which counsel may be allowed, the court will not be of counsel with him. Strange that such a principle should be tolerated in an enlightened and christian community! That the same man should be both counsel and judge in the same cause, is a solecism in jurisprudence, and an insult to common sense.

This hard and unnatural law was altered (for it never obtained in inferior crimes, and collateral points of law) as it respects high treason, by the 7 W. III. c. 3. s. 1., which authorizes and requires the court to assign a prisoner charged with the crime of treason, such counsel, not exceeding two, as they shall themselves require; and the counsel so assigned, shall, at reasonable times, have free access to him. It also gives him a copy of the indictment, which, by the common law, he was not entitled to either in treason or felony. He might, indeed, have it read over to him distinctly, and was then obliged, if ever, to make his exceptions to it. Now, under the sta-

tute 7 Ann. c. 21, s. 11, he is entitled to a copy of the indictment ten days before trial; and by this statute he is entitled to a list of the jury and witnesses, mentioning their names, professions, and places of abode. See p. 305.

By an act of congress, 30th April, 1790, "Every person so accused, (of treason,) and indicted for any of the crimes aforesaid, shall also be allowed and admitted to make his full defence, by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized, and required, immediately upon his request, to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours; and every such person or persons accused or indicted of the crimes aforesaid, shall be allowed and admitted in his said defence to make that he or they can produce, by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them."

For the construction of this act of congress, see p. 304, 305. 2 Dall. 335 to 342.

Aid and comfort is explanatory of "adherence." This adherence may be given to subjects or citizens of a foreign prince or state, whether war be declared by them or the United States or not. To give intelligence to enemies; to send provisions to them; to sell arms to them, treacherously to surrender a fort to them, to cruise in a ship with them against the United States, these are acts of adherence, aid and comfort. To join with rebels in a rebellion, or with enemies in acts of hostility, is treason in a citizen by adhering to those enemies. But if this is done from a well-grounded apprehension of death, and while the party is under actual force, and he takes the first opportunity which offers to make his escape, this fear and compulsion will excuse him. 3 Wils. Lec. 105. 2 Dall. 86. It was decided in the circuit court of the United States, May Term, 1815, Baltimore, that delivering up prisoners and deserters to the enemy, is adhering to them, giving them aid and comfort, and is treason against the United States; and when the act amounts to treason, it involves the intention. (See page 477.)

"Adhering to their enemies, giving them, aid and comfort."

By an act of congress, 30th April, 1790, sec. 2: "If any person or persons having knowledge of the commission of any of the treasons aforesaid, shall conceal, and not, as soon as may be, disclose and make known the same to the President of the United States, or some one of the judges thereof, or to the president or governor of a particular state, or some one of the judges or justices thereof, such person or persons, on conviction, shall be adjudged guilty of misprison of treason, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars."

Misprison of treason.

By the constitution of the United States, art. 1, sec. 8 and 9: "Congress shall have power to define and punish piracies, and felonies, committed on the high seas, and offences against the law of nations."

Piracy.

This provision in the constitution in relation to the definition and punishment of piracy, was ably commented upon by Justice Story. (5 Wheaton, 159.) The power to "define and punish" is more applicable to felonies upon the high seas, (which are, from their nature, somewhat indeterminate, for offences against the law of nations cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations,) than to piracies, which are defined with reasonable certainty by the law of nations. The general practice of nations in punishing all persons, whether natives or foreigners, who have committed this offence against any person whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. (See page 222.)

The constitution having conferred on congress the power of punishing piracy, there can be no doubt of the right of congress to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States. (3 Wheat. 630. Sergt. Const. Law, 321.)

By the act of congress, 30th April, 1790, sec. 8: "If any person or persons shall commit, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain or mariner of any ship, or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandize, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and, being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought."

"Upon the high seas."

There have been a number of decisions under this act of congress. The words "upon the high seas," mean any waters upon the sea-coast, which are without the boundaries of low water mark, although such waters may be in a roadstead, or bay, within the jurisdictional limits of a foreign government: these limits, though neutral to war, are not neutral to crimes. 1 Gall. 624. Mason, 147. 5 Wheat. 200, 201. And it is within this act, whether the offence of piratical murder was committed on board of a vessel, or in the sea, as by throwing the deceased into the sea, and drowning him, or by shooting him when in the sea, though he was not thrown overboard. 5 Wheat. 418. And it is within this act, if the offence be committed on board a foreign vessel, by a citizen of the United States; or on board a vessel of the United States by a foreigner; or by a citizen or foreigner on board a piratical vessel; the offence is equally cognizable by the courts of the United States. 5 Wheat. 412, 416. And throwing a person into the sea from on board a vessel having

no national character, is piracy under this act. 5 Wheat. 418. A robbery committed on the high seas, is *piracy*, under the act of 1790; although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death; and the courts of the United States have jurisdiction of such robbery and piracy. 3 Wheat. 310, 326. And it has also been decided, that a vessel within a marine league of the shore, and at anchor in an open roadstead, where vessels only ride under the shelter of land, at a season when the course of the winds is invariable, is upon the high seas; and a murder on board of such vessel is within the act. 5 Wheat. 204, 205.

In relation to murder, under the above sec. of the act of 30th April, 1790, it has been held, that if the mortal stroke be given in a harbor of a foreign country, and the party stricken languish with the wound, and die on shore of the wound, it is not murder within this act. The death, as well as the mortal stroke, must happen on the high seas, to constitute it murder there. Congress, however, under the power to define and punish felonies on the high seas, may declare that a mortal stroke on the high seas, wherever the death may happen, shall be adjudged felony. Sergt. Const. Law, 339. Du Ponceau's Bynkershoek, 127. And murder committed in a harbor, within the territory of a state, is not within the 8th sec. of the act of 30th April, 1790, though committed on board a ship of the line of the United States, by one of the crew upon another. If the constitution, in extending the judicial power to all cases of admiralty and maritime jurisdiction, has granted to congress exclusive power to legislate, yet if they had not legislated, the courts of the United States cannot take cognizance of the case. Whether the courts of common law have concurrent jurisdiction with courts of admiralty over murders committed in bays, which are enclosed parts of the sea, and whether, therefore, the offence is within the jurisdiction of the state, and in whose bay it takes place, is not decided; but if such be the case, congress cannot, it seems, under this clause of the constitution, devert the state courts of jurisdiction in such case, though it might vest a concurrent one in its own courts. Ibid. 3 Wheat. 356.

It has been decided, that robbery and depredation committed by a person upon the high seas, on board any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not piracy within the true intent and meaning of this act. Sergt. Const. Law, 323. 3 Wheat. 633, 644. This opinion, however, was afterwards reconsidered, and it was then determined that it applied exclusively to a robbery or murder committed by a person on board of any ship or vessel belonging to subjects of a foreign state; that is, she must be the property of subjects of a foreign state under their control, and sailing under the flag of a foreign state, whose authority is acknowledged. For general piracy, murder or robbery, committed in the places described in this section, by persons on board a vessel, not at the time belonging to subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true

Upon what persons.

meaning of this act, and is punishable in the courts of the United States. *Ibid.* 5 Wheat. 151, 152. Piracy committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, the offender is considered as belonging to the nation under whose flag he sails, and the crime is within the act, and the courts of the United States have jurisdiction. 5 Wheat. 417.

Meaning of the term "robbery" in the above act.

The felonious taking the goods of another, from his person, or in his presence, on the high seas, *animo furandi*, by violence, or putting him in fear, is piracy. *Sergt. Const. Law*, 323. The term robbery, as mentioned in the act, is the crime of robbery, as mentioned and defined by the common law. 8 Cranch, 610. And although robbery upon land may not be punishable by the laws of the United States with death, yet a robbery upon the high seas is piracy within this act; notwithstanding the act says, "Murder or robbery, or any other offence, which, if committed *within the body of a county*, would by the laws of the United States be punishable with death, shall be deemed, taken and adjudged to be a pirate."

Piracy under color of a commission from any foreign prince or state.

By the 9th sec. of the act of the 30th April, 1790, it is enacted: "If any citizen shall commit any piracy or robbery aforesaid, or any act of hostilities against the United States, or any citizen thereof, upon the high sea, under color of any commission from any foreign prince or state, or on any pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon and robber, and, on being thereof convicted, shall suffer death."

The object of this section was obviously to make those acts piracy in a citizen, which were not so before, and which would be belligerent when committed on others. 5 Wheat. 201. It may be considered as doubtful whether a citizen taking a commission from a foreign prince or sovereignty, is to be considered within this act on a trial of piracy. 5 Wheat. 201. But there can be no doubt, that when offences of this kind are committed under color of a foreign commission, obtained for the purpose of covering the crime, they may be punished as if the party had no commission. 5 Wheat. 100. It was decided in the Circuit Court of the United States, New York, Dec. 16th, 1819, before Justice Livingston, that the act of capturing, where one sailed under a forged commission being proved, it was incumbent upon the party to show under what commission he captured. (*City-Hall Rec*, vol. 4, p. 161.) And that to prove a foreign commission, it is not necessary the witness should have seen him write who issued it; it is sufficient, if it passed at the office as a genuine one. *Ibid.* And that if a commission in blank was entrusted to one, and afterwards filled up, will be sufficient to exculpate a citizen from a charge of piracy in capturing a foreign vessel. *Ibid.*

Accessories. See 3 Wheat. 603.

By the 10th sec. of the act of 30th April, 1790: "Every person who shall, either upon the land or the seas, knowingly and wittingly aid and assist, procure, command, counsel or advise, any person or persons to do or commit any murder or robbery, or other piracy

aforesaid, upon the seas, which shall affect the life of such person, and such person or persons shall, thereupon, do or commit any such piracy or robbery, then all and every, such person so as aforesaid aiding, assisting, procuring, commanding, counselling or advising the same, either upon the land or the sea, shall be and they are hereby declared, deemed and adjudged to be accessory to such piracies before the fact, and every such person, being thereof convicted, shall suffer death."

In the case of the *United States v. Palmer et al.*, (3 Wheat. 653.), Case to which certified from the Circuit Court for the Massachusetts district, Palmer and others, citizens of the United States, had gone upon the high seas, entered and robbed the *Industria Rafaelli*, a Spanish ship, of various articles. In this case, (the question arose, (to use the language of the chief justice,) "whether this act extends farther than to American citizens, or to persons on board American vessels, or to offences committed against citizens of the United States. The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States. The only question is, has the legislature enacted such a law? Do the words of the act authorize the courts of the Union to inflict its penalties, on persons who are not citizens of the United States, nor sailing under their flag, nor offending particularly against them." The court finally came to the decision, that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to the subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of crimes against the United States, and is not punishable in the courts of the United States. To supply this omission, a new provision was deemed to be necessary, and the following act was passed:

By the 5th sec. of the act, March 3d, 1819, "If any person or persons whatsoever shall, on the high seas, commit the crime of piracy, as defined by the law of nations, such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the Circuit Court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death."

Under the above section, it was contended that congress had not defined the crime, but had referred to the law of nations for a definition: that piracy was a general term, not clearly or sufficiently explained by that law. (P. 213.) That it was the duty of congress to have defined the offence in terms: they having neglected to do so, no conviction could take place under the act. But it was decided congress had defined the crime with sufficient certainty: they may do it by an enumeration in detail of all the facts constituting the offence; that they may as well define by using a term of a known determinate meaning, as by an express enumeration of all the particulars included in that term. That is certain, which by a necessary reference is made certain. To define piracies, in the sense of

Piracy under
the act of 1819.

the constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name, and determinate extent, or by enumerating the acts in detail upon which the punishment is inflicted. 5 Wheat. 158.

Act of 15th
May, 1820.

At the next session of congress, the act of the 15th May, 1820, was passed; (the 5th sec. of the act of 1819 expired by its own limitation.) The sec. of which declares that, "If any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ships' company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate; and, being thereof convicted, before the Circuit Court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death. And if any person engaged in any piratical cruise or enterprize, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and on shore shall commit robbery, such person shall be adjudged a pirate; and, on conviction thereof, before the Circuit Court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death." See slave trade.

Murder.

By the act of congress, April 30th, 1790, sec. 3: "If any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death."

By the constitution of the United States (art. 1, sec. 8): "Congress shall have power to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

"Wilful murder," as expressed in the above act, is defined by the common law. The rules of definition and construction must, therefore, be learned from that source.

The place where, when the offence is committed upon land, under the 8th article of the constitution, and the above act, must be in pursuance of the constitution, for the erection of "forts, magazines, arsenals, dockyards, and other needful buildings." Notwithstanding a grant by a state of a tract of territory, in pursuance of the provision in the constitution, declaring the place shall be subject to the jurisdiction of the United States, with a reservation of a right to serve process within the tract, yet if congress do not assume the authority, by some act for some or one of the purposes above mentioned, a state court has jurisdiction of offences committed within the tract.

Congress have power to and *may* exercise exclusive legislation over the places purchased by the consent of the state legislature, as they have done with respect to the District of Columbia; but they are not *obliged* to exercise that power; and if they do not, the state authority is unimpaired. Congress have not the *exclusive power of legislation* as to those places, but they have power to *exercise* exclusive legislation; and this power they need not exercise unless they think fit: if they do exercise it, their authority is exclusive; if they do not, the state has jurisdiction of crimes committed within the ceded tract. Per Colden, Mayor, New York General Session, February, 1819, *Lent's case*. See 1 Mass. Rep. 60, per Story, J. 8.

The words "in any other place," is intended any place of similar character with those previously enumerated in the act. It means an object fixed and territorial. It does not, therefore, embrace an offence committed on board a ship of the line, nor does any other act which gives the ordinary courts of the United States jurisdiction in those cases. 3 Wheat. 391. *Serg. Const. Law*, 333. In other places.

It has been decided, under sec. 8 of the act of 1790, that if the mortal stroke be given in a harbor of a foreign country, and the party stricken languish with the wound, and die on shore of the wound, it is not murder within the act. The death, as well as the mortal stroke, must happen on the high seas, to constitute it murder there. Congress, however, under the power to define and punish felonies on the high seas, may provide that a mortal stroke on the high seas, wherever the death may happen, shall be adjudged felony.

Under the words "out of the jurisdiction of any particular state," it has been determined that murder committed in a harbor, within a state, is not within sec. 8 of the act of 30th April, 1790, though committed on board of a ship of the line of the United States, by one of the crew upon another. If the constitution, in extending the judicial power to legislate, yet if they have not legislated, the courts of the United States cannot take cognizance of the case. Whether the courts of common law have concurrent jurisdiction with courts of admiralty over murders committed in bays, which are inclosed parts of the sea; and whether, therefore, the offence is within the jurisdiction of the state in whose bay it takes place, is not decided; but if such be the case, congress cannot, it seems, under this clause of the constitution, divest the state courts of jurisdiction in such case, though it might vest a concurrent one in its own courts. *Serg. Const. Law*, 333. 3 Wheat. 390.

By the act of congress, April 30, 1790, sec. 6: "If any person or persons, having knowledge of the actual commission of the crime of wilful murder, or other felony, upon the high seas, or within any fort, arsenal, dock yard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States, shall conceal, and not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority under the United States, on conviction thereof, such person or persons shall be adjudged guilty of misprison of felony." Misprison of felony.

felony, and shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars."

Revolt on the high seas, &c. By the act of 30th April, 1790, sec. 8., "If any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust; or shall make a revolt in the ship, every such offender shall be deemed, taken and adjudged to be a pirate and felon: and, being thereof convicted, shall suffer death." By sec. 12 of the same act:

"If any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt, or endeavor to corrupt any commander, master, officer, or mariner, to yield up or run away with any ship or vessel; or with any goods, wares or merchandize; or to turn pirate, or to go over to or confederate with pirates; or in anywise trade with any pirate, knowing him to be such; or shall furnish such pirate with any ammunition, stores or provisions of any kind; or shall fit out any vessel knowingly, and with a design to trade with, or supply or correspond with any pirate or robber upon the seas; or if any person or persons shall in any way consult, combine, confederate or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman shall confine the master of any ship or other vessel, or endeavor to make a revolt in such ship or vessel, such person or persons so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars."

An endeavor to make a revolt. An endeavor to make a revolt in a ship, is an endeavor to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is in effect an endeavor to make a mutiny among the crew of the ship, or to stir up a general disobedience or resistance to the authority of the officers of the ship. *United States v. Smith et al.*, 1 Mason, 147. A mere act of disobedience to a lawful command of the officers is not, of itself, an endeavor to make a revolt; but to amount to the offence, it must be combined with an attempt to excite others of the crew to a general resistance or disobedience of orders; or a general neglect or refusal of duty. If there be an endeavor to usurp the command and government of the ship, by combining the crew in hostility against the master and officers, this is properly an endeavor to make a revolt; and an endeavor to make a revolt necessarily implies an attempt to stir up others of the crew to a resistance or rebellion against the lawful authority of the master and officers; and the offence is not committed if the party does not attempt or endeavor to combine or excite others of the crew to aid in his unlawful purposes. *Ibid.* 148.

To make a revolt. Seamen of the United States, put on board a vessel of the United States, by a consul, in pursuance of the 4th sec. of the act of congress, 29th Feb. 1803, are within the meaning of the act of congress, entitled, "An act for the punishment of certain crimes against the United States"; and are bound by the same obligations which exist in cases of articulated seamen. 1 Peters, 127. To make a revolt within the 8th sec. is to throw off all obedience to the master; to take possession, by force, of the vessel by the crew; to

navigate her themselves, or to transfer the command to some other person on board. Ib. A confinement of the master, whether by force or by intimidation, is a confinement within the act of congress. Sec. 12. If a number of men associate themselves together, it is not necessary they should be proved, individually, to have used any force or threats to compel the master to confine himself in his cabin, or to resign his command; it is sufficient if they joined in general confederacy, and by their presence countenanced the acts of violence which produced these consequences. Ib. 126.

A master of a vessel may, however, so conduct himself as to justify the officers and crew in placing restraints upon him, to prevent his committing acts which might endanger the lives of all persons on board; but an excuse of this kind must be listened to with great caution, and such measures should cease the moment the occasion of them ceases. 1 Peters, 129. Judge Washington intimated his opinion that the clause in the section relating to revolt, applied to merchant vessels in time of peace, as well as in time of war, whereas the other clause, next preceding, was confined to hostile resistance in time of war; yet, as he could find no authority in the common, admiralty, or civil law, to support this opinion, and the definitions given by philologists were multifarious and different, the case being of a capital nature, the court would not recommend to the jury to find the prisoner guilty of making or endeavoring to make a revolt, however strong the evidence might be, but of confining the master. Serg. Const. Law, 335. Peters, 118, 213. An indictment under the 12th sec. will be supported, if it be proved the captain was restrained from performing the duties of his station, by such mutinous conduct of his crew as might reasonably intimidate a firm man; this would amount to a constructive confinement, within the meaning of the law; and that it made no difference in this respect that the master did, in fact, go unmolested to every part of the vessel whenever he pleased; if he was compelled, by a regard to his own safety, to go armed; and if in the opinion of the jury, from all the circumstances of the case, it was necessary and prudent for him to do so; and that seizing the captain amounted to an actual confinement, although the restraint continued only a minute or two; the law making no distinction as to the duration of the confinement. Ibid. 213.

Confinement
of the master.

By the act of congress, April 30, 1790, sec. 7: "If any person or persons shall, within any fort, arsenal, dock yard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of manslaughter, and shall be thereof convicted, such person or persons shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars." Manslaughter

By the 12th sec. of the act of congress, 1790: "If any seaman or other person shall commit manslaughter upon the high seas, &c., such person or persons so offending, and, being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars."

Manslaughter, committed in a fort, arsenal, &c., under the exclusive jurisdiction of the United States, as mentioned in the 7th sec. is subject in its definition and construction to the rules of the

common law which govern the crime, and which may be found in the books of such writers as Hale, Hawkins and Blackstone.

On an indictment under the 12th sec. of the act of 1790, it was decided that a manslaughter committed by a captain of a merchant vessel upon one of the seamen on board the vessel, in the river Tigris, in the empire of China, thirty-five miles above its mouth, about one hundred yards from the shore, in four and a half fathoms water, and below low water mark, was not punishable by the laws of the United States. 5 Wheat. 76.

Maiming.

By an act of congress, April 30th, 1790, sec. 13: "If any person or persons, within any of the places upon the land under the sole and exclusive jurisdiction of the United States, or upon the high seas, in any vessel belonging to the United States, or to any citizen or citizens thereof, on purpose, and of malice aforethought, shall unlawfully cut off the ear or ears, or cut and disable the tongue, put out an eye, slit the nose, cut off the nose or lip, or cut off or disable any limb or member of any person, with intention in so doing to maim or disfigure such person in any the manners before mentioned, then, and in every such case, the person or persons so offending, their counsellors, aiders and abettors, (knowing of and privy to the offence aforesaid,) shall, on conviction, be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars."

There has been no decision, or at least none reported in the books, under the above section. Maiming is a statutable offence in Great Britain and in this country. The above section is a literal copy of the 22 and 23 Car. 2, c. 1., commonly called the Coventry act, except the terms "lying in wait," are not used in the above section, which is a principal ingredient of the crime under the English statute.

Destroying vessels.

By an act of congress, March 26th, 1804, sec. 1: "Any person, not being an owner, who shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy, any ship or other vessels unto which he belongeth, being the property of any citizen or citizens of the United States, or procure the same to be done, and being thereof lawfully convicted, shall suffer death."

And by the same act, sec. 2: "If any person shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy, any ship or vessel of which he is owner, in part or in whole, or in any wise direct or procure the same to be done, with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite, any policy or policies of insurance thereon, or if any merchant or merchants that shall load goods thereon, or of any other owner or owners of such ship or vessel, the person or persons offending therein, being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall suffer death."

An indictment under the first section will be sustained by proving the prisoner was aiding and abetting in corruptly and wilfully casting away and destroying, &c., any ship or vessel. He need not perform the act himself, but it may be done by others, by his direction: the common law doctrine of principal and accessory prevail in the construction of this act. Jacobson's case, Circuit Court, U. S., New York, Sept. 1817, before Livingston, Justice. 2 City-

Hall Rec. 131. It was also decided that where the owner is aboard, and is in concert with the prisoner, if the act of destroying the vessel was wilful and corrupt, for the purpose of defrauding the underwriters, &c., it is within the statute. But to burn or destroy a vessel in the presence of the owner on board, and with his consent, if no other person is defrauded, is no offence within the above section. *Ibid.*

To destroy a vessel, under the act of 26th March, 1804, is to unfit her for service, beyond the hopes of recovery by ordinary means. *Casting away and burning* are a different species of destruction, both of them mean such an act as causes the vessel to perish—to be lost—to be irrecoverable by any means. U. S. Circuit Court, April, 1806, MS., South Carolina. 4 Dall. 417, 418. The act of congress against wilfully destroying a vessel at sea, does not make it an offence, if done to the prejudice of underwriters on the cargo; but on an indictment for destroying a vessel, to the prejudice of underwriters on the vessel, evidence may be given that the cargo was insured, of the amount insured, and the real value, in order to prove a motive for committing the offence, or for not doing it. *Ibid.* And in an indictment against a mate, for casting away a vessel on the high seas, being the property of a citizen of the United States, the prisoner not being such owner, it appeared in evidence that it was done by order of the owner, that the vessel was insured, and that part of the cargo belonged to third persons. It was held this was an offence under the first section of the act 26th March, 1804, and that it was sufficient if the interest of third persons appeared in evidence. *United States v. Vanranst*, April, 1819. Phila. C. C. MS. Reports.

But where the owner has committed the offence, it comes within sec. 1 of the act of 1804, and then the interest of other persons must be charged in the indictment, and proved. The owner of a vessel and cargo may destroy his own property himself, or cause it to be done by others, without committing any offence against the laws of the United States. *Ibid.* And on an indictment for casting away a vessel, to the prejudice of insurance, a corporate body, the charter of incorporation must be produced to prove the policy valid. U. S., April, 1806, MS. 4 Dall. 415.

By an act of congress, 30th January, 1799, sec. 1: "If any person, being a citizen of the United States, whether he be actually resident or abiding within the United States, or in a foreign country, shall, without the permission or authority of the government of the United States, directly or indirectly, commence or carry on any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, in relation to any disputes or controversies with the United States; or defeat the measures of the government of the United States; or if any person, being a citizen of or resident within the United States, and not duly authorized, shall counsel, advise, aid or assist, in any such correspondence, with intent as aforesaid, he or they shall be deemed guilty of a high misdemeanor; and, on conviction before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding five thousand dollars, and by imprisonment during a term not less than six months, nor exceeding three years."

Intercourse with the enemy, &c.

No prosecutions have ever taken place under the above section.

Perjury.

By an act of congress, April 30th, 1790: "If any person shall wilfully and corruptly commit perjury, or shall by any means procure any person to commit wilful and corrupt perjury, on his or her oath or affirmation, in any suit, containing matter or cause depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States, every person so offending, and being thereof convicted, shall be imprisoned, not exceeding three years, and fined not exceeding eight hundred dollars, and shall stand in the pillory for one hour, and be thereafter rendered incapable of giving testimony in any of the United States courts until such time as the judgment so given, against the said offender, shall be reversed."

An indictment, charging the perjury to have been committed on the hearing of a certain complaint against A. B. and others, for piracy, "depending before the Hon. J. D., then and ever since being judge of the district court of the United States," is not good under this act. The act applies only to suits depending in court; and that should be stated in the indictment that it was taken in pursuance of the laws of the United States. The word deposition means written testimony, and cannot be construed to include a verbal oath. 1 Gall. 497. The day on which the offence was committed must be precisely stated in the indictment. *U. S. v. Bowman*, MS., Philad. 1809.

Obstructing process.

By an act of congress, of April 30th, 1790, sec. 22: "If any person or persons shall, knowingly and wilfully, obstruct, resist or oppose any officer of the United States, in serving or attempting to serve or execute any measure, process or warrant; or any rule or order of the courts of the United States; or any other legal or judicial writ or process whatsoever; or shall assault, beat or wound any officer, or other person duly authorized, in serving or executing any writ, rule, order, process or warrant aforesaid, every person so knowingly and wilfully offending in the premises, shall, on conviction thereof, be imprisoned not exceeding twelve months, and fined not exceeding three hundred dollars."

It is not a justification of the offence of obstructing the execution of process, issued out of a federal court, that the defendants were subordinate officers of the militia of a state, and acted under the sanction of a law of the state, and under orders from the governor and commander-in-chief of the militia of the state. *United States v. Bright*, circuit court, Philadelphia, 1809. Pamphlet, p. 190.

And a defendant in ejectment who refuses to deliver possession to the officer going to serve the writ of process, and by threats of violence, made when the officer comes to serve the process, is guilty of obstructing the process of the court; and the offence is within the act of congress. *United States v. Lowry*, circuit court, Philadelphia, April, 1808, MS.

Larceny.

By an act of congress of 30th April, 1790: "If any person, within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take any carry away, with an intent to steal or purloin, the personal goods of another; or if any person or persons, having at any time hereafter the charge and custody of any arms, ordnance, munition, shot, powder, or ha-

biliments of war, belonging to the United States, or of any victuals, provided for the victualling of any soldiers, gunners, mariners, or pioneers, shall, for lucre or gain, or wittingly, advisedly, and of purpose to hinder or impede the service of the United States, embezzle, purloin or convey away any of the said arms, ordnance, munition, shot, powder, habiliments of war, or victuals, then, and in every of the cases aforesaid, the person or persons so offending, their counsellors, aiders and abettors, (knowing of and privy to the offences aforesaid,) shall, on conviction, be fined not exceeding the fourfold value of the property so stolen, embezzled or purloined; the one moiety to be paid to the owner of the goods; the other moiety to the informer and prosecutor; and be publicly whipped, not exceeding thirty-nine stripes."

On an indictment upon the above section, it appeared that the supposed larceny was committed on board the American ship *Augusta*, while she lay in an enclosed dock, in the port of Havre, in *France*, into which dock the water was admitted only at the will of the owners.

Story, J. Upon this evidence the indictment is not maintained. The place where the ship lay was in no sense the "high seas." The admiralty has never held that the waters of havens, where the tide ebbs and flows, are properly the high seas, unless those waters are without the low water mark. The common law has attempted a still more narrow construction of the terms. 1 *Mason*, 152.

By an act of congress, April 30th, 1810, sec. 19: "If any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail or part thereof, such offender or offenders shall, on conviction, be imprisoned not exceeding ten years; and if convicted a second time of the like offence, he or they shall suffer death; and, if in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender or offenders shall suffer death. And if any person shall attempt to rob the mail of the United States, by assaulting the person having custody thereof, shooting at him, or his horse or mule, or threatening him with dangerous weapons, and the robbery is not effected, every such offender, on conviction thereof, shall be punished by imprisonment not exceeding three years. And if any person shall steal the mail, or shall steal or take from or out of any mail, or from out of any post office, any letter or packet, or if any person shall take the mail, or any letter or packet therefrom, or from any post office, whether with or without the consent of the person having custody thereof, and shall open, embezzle, or destroy any such mail, letter or packet, the same containing any article of value, or evidence of any debt, due, demand, right or claim, or any release, receipt, acquittance, or discharge, or any other article, paper, or thing, mentioned and described in the eighteenth section of this act; or if any person shall, by fraud or deception, obtain from any person having custody thereof, any mail, letter, or packet, containing any article of value, or evidence thereof, or either of the writings referred to or next above mentioned, such offender or offenders, on conviction thereof, shall be imprisoned not exceeding seven years. And if any person shall take

Robbery of
the mail, &c.

any letter or packet, not containing and article of value, or evidence thereof, out of a post office, or shall open any letter or packet which shall have been in the post office, or in the custody of a mail carrier, before it shall have been delivered to the person to whom it is directed, with a design to obstruct the correspondence, to pry into another's business or secrets, or shall secrete, embezzle, or destroy any such mail, letter, or packet, such offender, upon conviction, shall pay for every such offence a sum not exceeding five hundred dollars."

John Thompson Hare and James Alexander were indicted under the second clause of the 19th sec. of the act, which is in the following words: "Or if in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons." It appeared that between 10 and 11 o'clock, P. M., on the 11th of March, 1818, the great southern mail was stopped and robbed by the prisoners. They built a fence across the road, within two miles of Havre de Grace, and when the mail came up, they sprang from behind the fence, and presented pistols, which were cocked, and said, "Here we are, three of us, highway robbers, armed with double barrel pistols and dirks," and threatened to blow the driver's brains out if he made any resistance. They tied the driver and Mr. Ludlow, a passenger, and proceeded to plunder the mail. The driver and Mr. Ludlow both testified they considered his life (the driver's) in danger if he had made any resistance.

The robbers were subsequently arrested and tried before the circuit court of the United States, Baltimore, May, 1818. One count in the indictment charged them under the above clause of robbing the mail by putting the life of the driver in *jeopardy*. The other counts were for a simple robbery of the mail.

The counsel for the prisoners contended that the driver's life was not put in jeopardy by the use of dangerous weapons; that the mere *possession* and *exhibition* of dangerous weapons was not sufficient, as in this case; that there must be a *dangerous* use of *dangerous* weapons, as if a man strike at another with a sword, being within striking distance, or snap a loaded pistol or gun at him within reaching distance. But if a man has a sword by his side, or a pistol in his belt, and he stops the mail, and says to the carrier, you see I am armed, deliver the mail or I will take your life, it could not satisfy the law; the mail carrier might be said to have been put in *fear of life*, but not in *jeopardy* of life; that the use of dangerous weapons to produce *fear of life* may be very different from the use of dangerous weapons to put life in *jeopardy*; that nothing in this act could render a man guilty, but such a use of these as puts life in jeopardy.

They contended that the possession and exhibition of dangerous weapons at the time of effecting the robbery, is not, *per se*, a use of them, or putting life in jeopardy; or that firing a pistol in the air, with a view of intimidation, is such a use as the law contemplated; or that brandishing swords and daggers is such a use of dangerous weapons as puts life in jeopardy.

They contended that the original meaning of the word *jeopardy* meant real, imminent, and actual danger, and that the meaning of

the term as translated in every language, implied imminent peril, hazard and danger. The verb *perjurar* is derived from the French *perjur*—I have lost all and that the substantive *perjuicio* means a lost cause. In the Spanish language, *arriesgar* signifies jeopardy, and is construed real peril or extreme danger, and that the term as used in scriptures, Luke, chap. 8, v. 25, *sed*, chap. 13, v. 16, denoted present, actual and positive danger. The context contended that to "wound the driver, or put his life in jeopardy," were used by congress in convertible and synonymous terms. They were intended as explanatory of each other, and to show that unless the wounding was of such a nature as to jeopardize life, the offense was not within the second clause of the above section; that the wounding was to be the criterion of jeopardy; that the mere apprehension of the party could never be considered the criterion of how dangerous; that the object of the act was the endangerment of the former post-officer's life; and that congress never intended to punish a simple robbery of the mail with death; and that by a reference to the act of 1790—18, it would appear that the legislature never intended that a simple wounding of the driver should be punished capitally. The words in this act being "touch" wound the driver. And that the third clause of the 10th section of the act of 1816 explains what is meant by the use of "dangerous weapons." "Jeopardizing life." The words are, "and if any person shall attempt to rob the mail of the United States, by assaulting the person having custody thereof, shooting at him, or his horse or mule, or threatening him with dangerous weapons, and the offender is an offender, every such offender, on conviction thereof, shall be punished by imprisonment not exceeding three years." Here is a manifest distinction made by congress between the mere shooting, shooting at, and threatening with dangerous weapons the mail driver, and the "wounding or putting life in jeopardy by the use of dangerous weapons" described in the first clause. It is a distinction not only of crime but of punishment. The mere shooting, shooting at, or threatening the driver, without wounding, is punished only by imprisonment, while the wounding or putting his life in jeopardy, is punished with death. The words used in the 3d clause are exactly descriptive of the offense of simple robbery in the first clause; for no robbery of the mail ever was or ever could be perpetrated without shooting, shooting at or threatening the carrier with dangerous weapons. The only difference between the two clauses is, that if the robbery is effected in the manner now described, the punishment is *five years' imprisonment*; but if the attempt to rob is not, the punishment is reduced to three years' imprisonment. If, however, the robbery should not be effected, but in the meantime shooting at or threatening with dangerous weapons, the driver should be wounded so as to put his life in jeopardy, then the punishment is death.

The reason for the United States contending that congress did not intend to create a new offense, unknown to the common law, by this section, is that they had only extended the offense of robbery to a new subject; thus in the 1st clause of this act, the term robbery is used without any definition; and that when the constitution and laws of the United States used a common law phrase, it was necessary to resort to the common law for its explanation; that the act—

quence, you are required to adopt principles of construction so subtle and metaphysical, as to what will or will not constitute jeopardy, that there are perhaps not twelve men in the community who will agree in their application to the same case; if you take the plain case, which it seems to me was clearly before congress, that robbing the mail upon the highway by the use of weapons dangerous to life, every case which can arise, is carved, and the act is perfect harmony within itself. By any other construction, the act is rendered imperfect, unjust and absurd.

**Decision of
the court.**

The court decided, that "robbing the carrier of the mail of the United States, or other person entrusted therewith, of such mail, by stopping him on the highway, demanding the surrender of the mail; and at the same time showing weapons calculated to take life, such as pistols or dirks, putting him in fear of his life, and obtaining possession of the mail by the means aforesaid, against the will of the carrier, is such a robbing of the mail, and such a putting the life of the carrier or person entrusted therewith in jeopardy, by the use of dangerous weapons, as will bring the offence within the following terms, of the 19th sec. of the act of congress of the 30th April, 1810, entitled, 'An act regulating the post office establishment,' to wit: 'or if, in effecting such robbery of the mail the first time, the offender shall wound the person having the custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death.'" The defendants were convicted and executed.

Wood's case.

In another case, the *United States v. Wood*, Philadelphia, June, 1818, which was for having aided and abetted John Thompson Hare and Alexander, in the robbery of the mail, the law, as laid down to the jury in Hare's case, was recognized by Judge Washington, and the prisoner was convicted.

**Bernard's
case.**

So also in the case of Bernard and others, indicted and found guilty of robbing the mail near New Brunswick, (Trenton, N. J., 1819, before the Hon. Bushrod Washington,) the same principle was again recognized, that the possession and exhibition of dangerous weapons in effecting the robbery of the mail, was within the 2d clause of the 19th sec. of the act of congress of the 30th April, 1810.

**Aminhisor's
case.**

So also in the case of the *United States v. John Aminhisor*, circuit court United States, Baltimore, Dec., 1823. The same rule of law was recognized by the same judges who sat upon the trial of Hare and Alexander. It appeared by the testimony in this case, that, on the morning of the 8th July, 1823, between 3 and 4 o'clock in the morning, the great southern mail was stopped and robbed by three men, Aminhisor, Moore and Ward.

Patrick Green, the guard of the mail, details the circumstances as follows: "On the morning of the 8th of July, between the hours of 3 and 4, on the main road, between Rouse's tavern and Baltimore, he perceived a fence ahead of the stage, and, suspecting an attack, cautioned the driver to be on his guard. As they approached the fence, he descried three men on the right of the stage, among the trees. He immediately fired his blunderbuss at them; the horses were much frightened, and ran up on a bank; two of the men then advanced, one on the right and the other on the left; the

one on the right armed with a pistol: the one on the left presented a musket to the breast of the driver, with the muzzle so near to the guard, that he caught hold of it and held it away from him until he could draw his pistol. He presented his pistol—it snapped; the robber then presented his musket a second time, and the guard fired his second pistol, and wounded the robber in the breast. One of the robbers then sprang into the stage, and knocked the guard down: he was then dragged from the carriage, and placed under the care of one of the robbers, while the other two proceeded to plunder the mail; these frequently called to the one who was watching over him, ‘Damn him, shoot him, or he will shoot you.’ He asked the man who guarded him with a pistol to his breast, ‘Do you mean to take my life?’ He replied, ‘How came you to shoot me?’ He told him it was his duty. He asked the robber a second time, ‘Do you mean to take my life?’ To which the robber replied, by again asking how he came to shoot him: and the guard said, as before, ‘It is my duty.’ The robber then said, ‘Don’t be afraid; you shall not be hurt; you are with a gentleman.’ The two men who were plundering the mail, called to the one who had the guard in safe keeping, ‘Hurrah! Larry, the packet is ready;’ upon which the robber pushed the guard into the woods, and went towards his associates.”

The counsel for the prisoner contended against such a construction of the act of congress, as would render the mere possession and exhibition of dangerous weapons, such a use of dangerous weapons as would of itself put the lives of the driver or the guard in jeopardy.

They strengthened their case by many illustrations, to show the extreme degree of danger denoted by the word “*jeopardy*,” and strenuously argued, that the intention of using the dangerous weapons must concur with the possession of them, before the life of the carrier or guard could be said to be in jeopardy. They denied that any such intention was manifested by Aminhisot or his associates; and they founded this denial upon this broad and immovable argument: that as the purpose which they went together to accomplish, was almost frustrated by the immediate and brave resistance of the guard; as the use of the dangerous weapons was necessary at the very commencement of the affray, if they ever intended to use them, as they had every opportunity of using them; and as the motive of revenge (for Moore and Ward were dreadfully wounded) conspired with the motive of apparent necessity, to dictate the use of those weapons; and as these dangerous weapons were never used, the inference of reason and of law would be, that the robbers did not intend to effect the robbery by the use of dangerous weapons, which would put the guard’s life in jeopardy.

The jury found them not guilty of the capital charge.

By an act of congress, May 10, 1800, sec. 1., “It shall be unlawful for any citizen of the United States, or other person residing within the United States, directly or indirectly, to hold or have any right or property in any vessel employed or made use of in the transportation or carrying of slaves from one foreign country or place to another, and any right or property belonging as aforesaid, shall be forfeited, and may be libelled and condemned for the use of the Slave trade.”

person who shall sue for the same; and such person transgressing the prohibition aforesaid, shall also forfeit and pay a sum of money equal to double the value of the right or property in such vessel which he held as aforesaid; and shall also forfeit a sum of money, equal to double the value of the interest which he may have had in the slaves, which at any time may have been transported or carried in such vessel, after the passing of this act and against the form thereof."

By sec. 2., "It shall be unlawful for any citizen of the United States, or other person residing therein, to serve on board any vessel of the United States, employed or made use of in the transportation or carrying of slaves from one foreign country or place to another; and any such citizen, or other person, voluntarily serving as aforesaid, shall be liable to be indicted therefor, and on conviction thereof, shall be liable to a fine not exceeding two thousand dollars, and be imprisoned not exceeding two years."

By an act of congress, 20th April, 1818, sec. 1., "From and after the passing of this act, it shall not be lawful to import or bring, in any manner whatsoever, into the United States or territories thereof, from any foreign kingdom, place or country, any negro, mulatto, or person of color, with intent to hold, sell or dispose of any such negro, mulatto, or person of color, as a slave, or to be held to service or labor; and any ship, vessel, or other water craft, employed in any importation as aforesaid, shall be liable to seizure, prosecution and forfeiture in any district in which it may be found; one half thereof to the United States, and the other half to the use of him or them who shall prosecute the same to effect."

By the 2d sec., "No citizen or citizens of the United States, or other person or persons, shall, after the passing of this act as aforesaid, for himself, themselves, or any other person or persons whatsoever, either as master, factor or owner, build, fit, equip, load or otherwise prepare, any ship or vessel, in any port or place within the jurisdiction of the United States, nor cause any such ship or vessel to sail from any port or place whatsoever within the jurisdiction of the same, for the purpose of procuring any negro, mulatto or person of color, from any foreign kingdom, place or country, to be transported to any port or place whatsoever, to be held, sold or otherwise disposed of as slaves, or to be held to service or labor; and if any ship or vessel shall be so built, fitted out, equipped, laden, or otherwise prepared for the purpose aforesaid, every such ship or vessel, her tackle, apparel, furniture and lading shall be forfeited, one moiety to the use of the United States, and the other to the use of the person or persons who shall sue for said forfeiture, and prosecute the same to effect; and such ship or vessel shall be liable to be seized, prosecuted, and condemned in any court of the United States having competent jurisdiction."

By the 3d sec., "Every person or persons so building, fitting out, equipping, loading, or otherwise preparing, or sending away, or causing any of the acts aforesaid to be done, with intent to employ such ship or vessel in such trade or business, after the passing of this act, contrary to the true intent and meaning thereof, or who shall any wise be aiding or abetting therein, shall severally, on conviction thereof, by due course of law, forfeit and pay a sum not ex-

ceeding five thousand dollars, nor less than one thousand dollars; one moiety to the use of the United States, and the other to the use of the person or persons who shall sue for such forfeiture, and prosecute the same to effect; and shall moreover be imprisoned for a term not exceeding seven years, nor less than three years."

By the 4th section, "If any citizen of the United States, or other person or persons resident within the jurisdiction of the same, shall, from and after the passing of this act, take on board, receive, or transport, from any of the coasts or kingdoms of Africa, or from any other foreign kingdom, place or country, or from sea, any negro, mulatto, or person of color, not being an inhabitant, nor held to serve by the laws of either of the states or territories of the United States, in any ship, vessel, boat, or other water craft, for the purpose of holding, selling, or otherwise disposing of, such person as a slave, or to be held to service or labor, or be aiding or abetting therein, every such person or persons so offending, shall, on conviction, by due course of law, severally forfeit and pay a sum not exceeding five thousand, nor less than one thousand dollars; one moiety to the use of the United States, and the other to the use of the person or persons who shall sue for such forfeiture, and prosecute the same to effect; and moreover shall suffer imprisonment for a term not exceeding seven years, nor less than three years."

It was decided under the act of congress of 10th May, 1800, sec. 2., that the words to "serve on board," included the captain as well as seamen, and all on board the vessel, employed or made use of, in the transportation of slaves: and that it was not necessary that any slave should be actually put on board such vessel; but that it was sufficient if the crew was engaged on the coast of Africa, in procuring slaves, and sending them to any other place by another vessel. 5 City-Hall Rec. 120., Livingston, Justice.

An indictment under the act of congress, of 1818, to prevent the equipment of any vessel, &c., alleged that the defendant equipped a certain vessel, &c., for the purpose of procuring slaves from a foreign country to the jurors unknown, to be transported to a place, to the jurors unknown, and on the trial it appeared that the place from which the slaves were to be procured, and that to which they were to be transported, were both known to the grand jury who found the indictment; it was held the indictment could not be sustained. Per Livingston, Justice. Circuit Court, U. S., New York, Sept. 1820.

The offence of sailing from a port with an intent to engage in the slave trade, is not committed unless the vessel sails out of the port under the act of 20th April, 1818, sec. 2. and 3. And if under the act of the 20th of April, 1818, sec. 2. and 3., the offence of causing a vessel to sail from a port of the United States, with an intent to engage in the slave trade, be alleged in the indictment to be on a day *now last past*, and on *divers days and times before and since that day*, the allegation is sufficient; for the words, "*now last past*," mean last past before the caption of the indictment, and the words, "*on divers days and times*," may be rejected as surplusage, if the offence be but a single offence. 2 Mason. 129. And in an indictment founded on the slave trade act of 20th of April, 1818, sec. 2. and 3. for causing a vessel to sail from a port of the United States,

to be employed in the trade, it is sufficient if the indictment alleges that the offence was committed after the passing of the act, "*at some time*" between certain specified days, though no day certain on which it is committed is specified. 2 Mason, 143. And sailing from a port with an intent to engage in the slave trade, under the sections 2 and 3, is not committed unless the vessel sails *out of port*. Ibid. 129. It is not necessary in an indictment to allege that the negroes were to be transported to the *United States* or their territories, or that they were free and not bound to service, or that the defendant was a citizen or resident within the *United States*, or that the offence was committed on board an American vessel. It is sufficient if the indictment follow in these respects the language of the statute, and is as certain; and it is sufficient to follow the phrase "persons of color," used in the statute, in the indictment. Ibid. 129. And it is sufficient to set forth in the indictment that the defendant, "as master for some other person, the name whereof being to the jurors yet *unknown*," caused the vessel to sail, &c. Ibid. It need not be averred in the indictment that the defendant knowingly committed the act. Ibid.

Military Expeditions.

By the act of April 20th, 1818, sec. 6, "If any person shall, within the territory or jurisdiction of the United States, begin, or get on foot, or provide and prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

See the trials of Judge Workman and Col. Kerr, before the United States Court for the Orleans district, on a charge of planning and setting on foot, a military expedition against Florida and Mexico. New Orleans, 1807.

It was decided in Burr's case. (Trial p. 191.) that on an indictment for this crime, proof of the act, and not the intention, will satisfy the statute. The act of congress does not extend to the secret design, if not carried into open deed, nor to any conspiracy, however extensive, if it do not amount to a beginning or setting on foot a military expedition. And the issue, on an indictment containing no charge of conspiracy, is whether the particular facts charged were committed; and a single individual may commit the crime. Sergt. Const. Law, 257. *ibid.* The following points under this statute were decided in Burr's case, (see Trial App. 191). Mr. Sergeant has extracted the following principles from the case:

1. That on indictment under this statute, the declarations of third persons, not forming part of the transaction, and not made in the presence of the accused, cannot be received in evidence.

2d. That any legal testimony showing the character and objects of the expedition, as, for instance, respecting the arms and provisions, no matter by whom purchased, the conduct of the parties concerned, or their public declarations, or marching against the foreign territory, any manifests to this effect, or agreement among themselves for such expedition, are evidence.

3d. The acts of accomplices, except so far as they prove the char-

acter and objects of the expedition, are not evidence. The accomplice is responsible himself; and he who procures or advises the act is an accessory, and he is not punishable as a principal under the act.

4th. The acts of the accused in a different district, constituting in themselves substantive cause for a prosecution, cannot be given in evidence, unless they go directly to prove the charges laid in the indictment. Providing means in Kentucky was, therefore, held not evidence under the indictment; though the declaration of the defendant in Kentucky that he had provided means in Wood county would be.

5th. Orders given in Kentucky, by the defendant, and means provided in consequence thereof in Virginia, are evidence on this indictment; if these orders were given to persons not accomplices, and not guilty, under the act, themselves; but if they are accomplices, it is otherwise.

The previous knowledge and approbation of the President of the United States to the illegal acts of a citizen under the above section is no excuse or justification. The president's duty is faithfully to execute the laws, and he has no such dispensing power. The United States cannot be constitutionally at war, but when war is authorized by congress, or is rendered an act of necessity by the invasion of a foreign enemy. Principles of self defence in such case point it out as the duty of the chief magistrate of the nation, in the interim of congress, to repel force by force. (Smith and Ogden's Trial, p. 237.) Judge Paterson decided, that a state of peace is one of the ingredients necessary to make a military expedition criminal; for although the defendant was concerned in setting on foot, or preparing the means for a military expedition against the Spanish dominions, if the United States were, at that time, at war with Spain, he would be innocent; and should the jury so determine, they ought to acquit the defendant upon this indictment. It matters not whether the expedition is consummated, or whether it fails. Whether the vessel at the time of sailing is in readiness for hostile engagement, or whether her capacity is sufficient to achieve the object, is immaterial; and converting a merchant ship into a vessel of war, must be deemed an original outfit; for the act would otherwise become nugatory and inoperative: it is the conversion from the peaceable use to a warlike purpose that constituted the offence. Ibid.

By an act of congress 20th April, 1818, sec. 3., "If any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed; or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state; or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state; or of any colony, district or people, with whom the U. States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every person so

Fitting out and arming ships or vessels to be employed in the service of some foreign prince, &c.

offending, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States."

And by the 4th sec., "If any citizen or citizens of the United States shall, without the limits thereof, fit out and arm; or attempt to fit out and arm; or procure to be fitted out and armed; or shall knowingly aid or be concerned in the furnishing, fitting out, or arming, any private ship or vessel of war, or privateer, with intent that such ship or vessel shall cruise or commit hostilities upon the citizens of the United States, or their property, or shall take the command of, or enter on board of any ship or vessel, for the intent aforesaid; or shall purchase any such ship or vessel, with a view to share in the profits thereof; such person so offending, shall be deemed guilty of a high misdemeanor; and fined not more than ten thousand dollars, and imprisoned not more than ten years; and the trial for such offence, if committed without the limits of the United States, shall be in the district in which the offender shall be apprehended or first brought."

And by the 5th sec., "If any person shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, or shall knowingly be concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district or people; or belonging to the subjects or citizens of any such prince or state, colony, district or people, with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger calibre, or by the addition thereto of any equipment, solely applicable to war; every person so offending shall be deemed guilty of a high misdemeanor, shall be fined not more than one thousand dollars, and be imprisoned not more than one year."

Captain Skinner, Don Manuel Aguirre, and Mr. Delano, were arrested and brought before judge Livingston, in pursuance of a warrant, July, 1818, New York, (see page 233.) charged with fitting out or arming two ships, to be employed in the service of some foreign prince, &c., under the 3d sec. of the act of congress.

His honour decided, that no instructions were necessary on the part of the president, or any other officer of government, to justify the issuing a warrant for the violation of this law; nor had the president any right to interfere with the proceedings which have commenced in the case, by giving any instructions to him. Nor was it necessary that the application for a warrant should be made by the district attorney; as any individual might complain of the infraction of the law; and he considered it his duty to award a warrant whenever complaint was made to him on oath, of a crime being

committed, whether such warrant was applied for by the district attorney, or any other person.

And that as to any privilege, *Ms. Aguirre's* commission conferred on him, (he being a public minister,) he not being accredited by the president; and the independence of Buenos Ayres not being acknowledged by the government of the United States, was liable to be proceeded against for any offence which he might commit against our laws; and that to bring the offence within the 3d sec. the vessel must be armed as well as fitted out; and that it did not appear by the act that congress intended to prohibit the citizens of the United States from building vessels, and selling them to either of the belligerents, so long as they were not armed.

In the case of a principal, it was clearly necessary, by the very terms of the law, to render him criminal, that the vessel should be fitted out and armed. Those, therefore, who were knowingly concerned in the furnishing, fitting out, or arming of such ship or vessel, must also be considered as innocent, until an actual armament took place, or this absurdity would result, that one man might have a vessel built and fitted out for this purpose, without being guilty of any offence, while the whole penalty of the law might be incurred by a person who would furnish her with a single suit of sails, or a cable; and accordingly he discharged the parties. *Ibid.*

The 3d sec. was meant to include all cases of vessels, armed within our ports, by one of the belligerent powers, to act as cruisers against another belligerent power, in peace with the United States. Converting a ship from her original destination, with intent to commit hostilities; or, in other words, converting a merchant ship into a vessel of war, must be deemed an original outfit; for the act would, otherwise, become nugatory and inoperative. It is the conversion from the peaceable use, to the warlike purpose, that constitutes the offence. *Per Paterson, J. 2 Dall. 328.* Where a vessel, employed in the Guinea trade, arrived at Philadelphia, with a cargo of sugar and cotton, and was converted from a merchant vessel carrying a few guns, to a privateer, it was held a "fitting out" under the 3d section.

A vessel built in the United States, with the express view of being employed as a privateer, in case of an expected war between Great Britain and the United States, was sold to a French citizen, and by him carried to a French island; and there equipped, armed, and commissioned, it was held that she was not illegally equipt within the third sec. of the act of the 5th June, 1794. *2 Dall. 307.*

By an act of congress, April 30th, 1810, sec. 7., "If any person shall knowingly and wilfully obstruct or retard the passage of the mail, or any driver or carrier, or any horse or carriage carrying the same, he shall, on conviction, for every such offence, pay a fine not exceeding one hundred dollars: And if any ferryman shall, by wilful negligence, or refuse to transport the mail across any ferry, delay the same, he shall forfeit and pay, for each ten minutes that the same shall be so delayed, a sum not exceeding ten dollars. Obstructing the mail.

On an indictment for wilfully obstructing the mail, it is no justification that the defendant fed the horses employed in the transportation of the mail; no lien exists against the government. And the right of an innkeeper to detain a horse for his food, does not extend to horses owned by individuals, and employed in the transportation of the mail, nor to horses owned by the United States, and employed in that service. No lien can exist against the government in any case. P. 514. A stolen horse transporting the mail stage, cannot be seized by the owner, so as to retard the mail; nor can the mail be obstructed by arresting the driver for debt. Ibid.

The law does not allow any justification of a wilful and voluntary act of obstruction to the passage of the mail. Ibid. 517. A defendant cannot justify stopping the mail under an ordinance of a city which imposes a fine for driving at "an immoderate rate;" an officer however may prevent the peace from being broken. 1 Peters, 892. The act of congress should not be so construed as to shield the carrier of the mail against a temporary stoppage of the mail, by a municipal officer, where it is driving through a populous city at such a rate as to endanger the lives of the inhabitants if the act amounted to a breach of the peace.

Fugitives
from justice
and labour.

Constitution, art. 4. sec. 2. "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand, of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." And by sec. 3. "No person held to service or labour in one state under the laws thereof, escaping into another, shall in consequence of any law, or regulation therein, be discharged from such service or labour; but shall be delivered up on claim of the party to whom such service or labour may be due."

By an act of congress, 12th February, 1793, sec. 1. "Whenever the executive authority of any state in the union, or either of the territories northwest, or south of the river Ohio, shall demand any person, as a fugitive from justice, of the executive authority of any such state or territory to which such person shall have fled, and shall, moreover, produce the copy of an indictment found, or an affidavit made, before a magistrate of any state or territory as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so discharged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear; but if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs or expenses, incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory."

By the 2d sec. "Any agent, appointed as aforesaid, who shall

receive the fugitive into his custody shall be empowered to transport him or her to the state or territory from which he or she shall have fled. And if any person or persons shall, by force, set at liberty, or rescue the fugitive from such agent while transporting, as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year."

And by the 3d sec. "When a person held to labour in any of the United States, or in either of the territories, on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said states or territory, the person to whom such labour or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labour, and to take him or her before any judge of the circuit or district court of the United States, residing or being within the state, or before any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made, and upon proof, to the satisfaction of such judge or magistrate, either by oral testimony, or affidavit taken before, and certified by a magistrate of any such state or territory, that the person so seized or arrested doth under the laws of the state or territory from which he or she fled, owe their service or labour to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labour to the state or territory from which he or she fled."

And by the 4th sec. "Any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in seizing or arresting such fugitive from labour, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested, pursuant to the authority herein given or declared; or shall harbour or conceal such person after notice that he or she was a fugitive from labour, as aforesaid, shall, for either of the offences, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered by and for the benefit of such claimant, by action of debt, in any court proper to try the same; securing, moreover, to the person claiming such labour or service, his right of action for or on account of the said injuries, or either of them."

A person committed as a fugitive from justice, will be retained a reasonable time, that he may be demanded by the executive of the state of which he is a fugitive, and if no demand is made within a reasonable time, he will be discharged. *Goodhue's Case*, before Radcliff, mayor, 1817. *City Hall Rec.* Vol. 1. 153. A person who stole a gun in New Jersey, and was apprehended in the city of N. York with the gun, was ordered to be detained as a fugitive from justice, until notice should be given to the executive of New Jersey, that he might be demanded and delivered up, as he could not be tried in the state of New York for the offence. 2 Johns. Rep. 479.

In Gardner's case (2 Johns. Rep. 477.) who was convicted in Washington county, of stealing a horse in Vermont, it was decided by the court, Kent C. J. that when the original taking is out of the jurisdiction of the state, the offence does not continue and accompany the possession of the thing stolen, as it does in the case where

a thing is stolen in one county, and the thief is found with the property in another county. The prisoner can only be considered as a *fugitive from justice* from the state of Vermont. A contrary decision was made in the supreme court of Massachusetts. (2 Mass. Rep. p. 14. See page 1. and Washburn's case. 4 Johns. C. Rep. 106.)

From labour. Under the foregoing provisions of the constitution, an act of congress; it has been decided in Pennsylvania, by the supreme court of that state, that if a female slave escape from Maryland into Pennsylvania, and, afterwards, become pregnant in the latter state, and be there delivered of a bastard child, such child is born free; the court declaring, that the constitution and act of congress embrace, in such case only the person escaping, and not the issue. Sergt. Const. Law. 387. 2 Sergt. and Rawle, 306.

The object of the act was to prevent fugitives from labour from sheltering themselves from service, by flying from the state into which they belonged, into an adjoining one. In such case, the claimant may seize such fugitive, and bring him or her before any magistrate of a county, city or town corporate, and make the requisite proof before the magistrate, whose duty it shall be to give a certificate. The act applies as well to whites as blacks, and the certificate may be obtained as well from a justice of the peace, in any town of the state, as from the highest judicial magistrate. The certificate is *prima facie* evidence of the facts it contains, but not conclusive. Per Colden, mayor, General Sessions, New York, 1819. An act of New Jersey of 1812 provided, that before any negro should be removed into any other state, a judge should, after examining him or her, give a certificate that such removal was with the free will and consent of such negro. On the 8th day of November, 1818, R. having purchased a black woman in the state of New Jersey, and having duly obtained such certificate, removed her out of the state. But on the 5th of November, 1818, the legislature of New Jersey passed an act, providing that no negro should be removed out of the state, except under certain circumstances, which did not apply to the removal of R.; and that if such negro should be removed, contrary to the act, he or she should be free. It was held, that by such removal, the person became free.

The certificate of a magistrate, under a statute of the United States, before whom a person has been brought, who has been arrested as a fugitive from labour, from a state or territory, under the laws of which such person is alleged to owe service or labour to the person claiming him or her, is not conclusive, and notwithstanding the certificate, another magistrate before whom such person is brought on a habeas corpus, in pursuance of the statute, (N. Y. R. Laws, vol. 2. p. 93.) may inquire into the facts of such confinement and restraint, and discharge, bail, or remand the party. (Ibid.)

The provision to the constitution is not to be so construed as to exempt fugitives from labour, by escaping into another state, from its penal laws.

If such have been guilty of felony, or of riots, violent assaults and batteries, or other offences which, though not felonies, are dangerous to the peace of the commonwealth, they are subject to prosecution and punishment. Where a slave absconded from Maryland,

and was committed to a gaol in Pennsylvania on a charge of fornication and bastardy, committed in the latter state, and an agent of the master came on to receive him, inasmuch as fornication is treated as a crime by the law of Pennsylvania, and where it is accompanied with bastardy, security is required for the maintenance of the child, the court remanded the slave to prison to answer the charges of fornication and bastardy. (3 Sergt. and Rawle, 4. But a fugitive cannot contract a debt in another state, so as to impair the right of the master to reclaim him. If, therefore, a person contract such debt with the fugitive slave in the state to which he fled, and, on the master's coming to reclaim him, sue out an attachment against such slave for the debt, on which the slave is arrested by an officer, and forcibly detained and imprisoned, although the laws of such state prohibit slavery, trespass lies in a court of the state where the master resides, to recover damage for the injury. Sergt. Const. Law, p. 387, 388. A., the owner of a slave in New York, went into the state of Vermont to reclaim his slave, who had run away from the service of his master, and resided there as a freeman. A. having taken the slave; while in his possession B. took an attachment against the slave for debt, on which the slave was arrested by an officer, and forcibly taken out of the possession of his master and imprisoned. A. brought an action of trespass against B. in New York, for taking away his slave, and it was held that, under the law of the United States, A. had a right to reclaim the slave, a fugitive from labour; and that as the slave was incapable of contracting a debt, the attachment was illegal and void, and no justification to B. 9 John's Rep. 67.

If a certificate be given by a state judge in pursuance to the act of Congress, which certificate is a valid warrant to remove the slave out of the state, and no writ of *hominem replegiando* lies after such certificate is given, to try the right of freedom in that state. Such a writ is a violation of the constitution, and will be quashed on the return. The slave's right to freedom may be tried in the state to which he is removed. 5 Sergt. and Rawle, p. 62. Contra, per Colden, mayor, who said he would not have it doubted for a moment whether a proceeding, under an act of the congress of the United States, before a single magistrate, was conclusive on the personal liberty of an individual; that it could not have been the intention of our national legislature. The certificate was, no doubt, *prima facie* evidence of the facts it contained, but not conclusive. 4 City Hall Rec. p. 48.

He so decided in the case of Jane Wilson, a black woman, who was brought before him on a habeas corpus. She was charged with being the slave of William Raburgh, of the state of New Jersey, and owed him labour and services there, and was a fugitive from that place. She was arrested in New York, and on a hearing before Judge Livingston, a certificate was given to remove her in pursuance of the laws of the United States; his honor the mayor decided, he was not concluded by the certificate of the circuit judge of the United States; and, for reasons detailed in the case, set her free. (Ibid.)

By an act of Congress, April 30, 1790, sec. 14. "If any person shall feloniously steal, take away, alter, falsify, or otherwise avoid edging bail in. Acknowl-

the name of any record, writ, process, or other proceedings, in any of the courts any other person, &c. of the United States, by means whereof any judgment shall be reversed, made void, or not take effect; or if any person shall acknowledge, or procure to be acknowledged, in any of the courts aforesaid, any recognizance, bail, or judgment, in the name or names of any person or persons not privy or consenting to the same, every such person or persons on conviction thereof, shall be fined not exceeding five thousand dollars, and be imprisoned not exceeding seven years."

Extortion. By an act of congress, 1st March, 1793. "If any officer herein before mentioned, or his deputy, shall, by reason or colour of his office, wilfully and corruptly, demand and receive, any greater fees than those allowed by this act, he shall on conviction thereof in any court of the United States, forfeit and pay a fine not exceeding five hundred dollars, or be imprisoned not exceeding six months, at the discretion of the court before whom the conviction shall be.

No prosecutions have ever occurred under the above section.

Ambassadors or other public ministers. By an act of congress, April 30th, 1790, sec. 26., "If any person shall sue forth, or prosecute any writ or process (against any ambassador or other public minister,) such person or persons, and all attorneys or solicitors prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, shall be deemed violators of the law of nations, and disturbers of the public repose, and be imprisoned not exceeding three years, and fined at the discretion of the court."

By the 27th sec., "If any person shall violate any safe conduct or passport duly obtained and issued under the authority of the United States, or shall assault, strike, wound, or imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister; such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court."

A servant of Mr. Daschkoff, the Russian minister, was arrested in Philadelphia for a small debt. The minister's carriage (in which were himself and family,) was stopped in the public street. No measures, however, were taken against the attorney who issued, or those who executed the process. It was understood to be the wish of the minister, that no prosecution should take place for the insult offered him. And those who were concerned in this illegal arrest are indebted to the humanity of that gentleman for not being made an example for an infraction, and a violation of the law of nations.

A secretary is entitled to all the immunities of a minister. *Ex parte Cabrera, Philadelphia, 1805. MS.*

In an indictment for an assault upon a public minister, the first count charged the offence under the act of congress; the second count for an infraction of the law of nations, by offering violence to the person of the minister. It appeared upon the trial that the violence alleged was firing a pistol at the minister's house. It was held the first count was not sustained, but that the second was: and that it must appear the defendant knew it to be the minister's house. *United States v. Hand, Philadelphia, 1818. MS.*

A prior assault by a foreign minister, deprives him of his privilege, and will excuse a battery committed upon him. *United States v. Little*, Oct. 1806, Philadelphia, MS.

By an act of congress, 1st April, 1806, sec. 1., "If any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting any gold or silver coins, which have been, or which hereafter shall be coined at the mint of the United States, or who shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting any foreign gold, or silver coins, which, by law, now are or hereafter shall be made current, or be in actual use and circulation as money within the United States; or who shall utter, as true, any false, forged, or counterfeited coins of gold or silver, as aforesaid, for the payment of money, with intention to defraud any person or persons, knowing the same to be falsely made, forged, or counterfeited; any such person, so offending, shall be deemed and adjudged guilty of felony, and being thereof convicted according to the due course of law, shall be sentenced to imprisonment, and kept at hard labour for a period not less than three years, nor more than ten years; or shall be imprisoned not exceeding five years; or fined not exceeding five thousand dollars."

And by the 2d sec., "If any person shall import, or bring from any foreign place into the United States, any false, forged, or counterfeit gold or silver coins, which are by law made current, or are in actual use and circulation as money, within the United States, with the intent to utter, or make payment with, the same, knowing the same to be falsely made, forged, or counterfeited; or who shall utter, as true, any such false, forged, or counterfeited coins of gold or silver as aforesaid, for the payment of money with intention to defraud any person or persons, knowing the same to be falsely made, forged, or counterfeited, the person so offending shall be deemed guilty of felony, and, being thereof convicted, according to the due course of law, shall be sentenced to imprisonment, and kept at hard labour, for a period not less than two years, nor more than eight years; or shall be imprisoned not exceeding two years, and fined not exceeding four thousand dollars."

And by the 3d sec., "If any person shall, fraudulently, and for gain sake, by any act, way or means, whatever, impair, diminish, falsify, scale, or lighten, the gold or silver coins which have been, or which shall hereafter be, coined at the mint of the United States, or any foreign gold or silver coins, which are by law made current, or are in actual use and circulation, as money, within the United States, every person so offending shall be deemed guilty of a high misdemeanor, and shall be imprisoned not exceeding two years, and fined not exceeding two thousand dollars."

The courts of the several states have cognizance of offences against the act relating to the coin, by express provision of the 4th sec. of the act.

Forgery, uttering, &c. By an act of congress, June 30, 1812, sec. 10., "If any person shall falsely make, forge, or counterfeit, or cause, or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making forging, or counterfeiting, any note, in imitation of, or purporting to be, a treasury note aforesaid; or shall falsely alter, or cause, or procure to be falsely altered, or willingly aid or assist in falsely altering any treasury note, issued as aforesaid; or shall pass, utter, or publish, or attempt to pass, utter, or publish as true, any false, forged or counterfeited note, purporting to be a treasury note as aforesaid, knowing the same to be falsely forged or counterfeited; or shall pass, utter, or publish, or attempt to pass utter, or publish, as true, any falsely altered treasury note, issued as aforesaid, knowing the same to be falsely altered, every such person shall be deemed and adjudged guilty of felony, and being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept at hard labour for a period not less than three years, nor more than ten years; and be fined in a sum not exceeding five thousand dollars."

By an act of congress, 26th Dec. 1814, sec. 6th., "If any person shall, with intent to injure or defraud the United States, or any person or corporation, falsely make, forge, or counterfeit; or cause, or procure to be falsely made, forged or counterfeited; or willingly aid or assist in falsely making, forging, or counterfeiting any note, in imitation of, or purporting to be a treasury note, or shall falsely alter, or cause or procure to be falsely altered, or wilfully aid or assist in falsely altering, any treasury note, issued by virtue of this act, or shall pass, utter, or publish, or attempt to pass, utter, or publish, as true, any false, forged, or counterfeited note, purporting to be a treasury note as aforesaid, knowing the same to be falsely made, forged, or counterfeited; or shall pass, utter, or publish, or attempt to pass, utter or publish as true, any falsely altered treasury note, issued as aforesaid, knowing the same to be falsely altered; every such person shall be deemed and adjudged guilty of felony; and being thereof convicted by due course of law, shall be sentenced to be imprisoned for a period not less than three years, nor more than ten years, or imprisoned and kept to hard labour for a period not less than three years, nor more than ten years, and in either case, be fined in a sum not exceeding five thousand dollars."

Bribery.

By an act of congress, of April 30th, 1790, sec. 21., "If any person shall, directly or indirectly, give any sum or sums of money, or any other bribe, present or reward, or any promise, contract, obligation, or security, for the payment or delivery of any money, present, or reward, or any other thing to obtain or procure the opinion, judgment or decree of any judge of the United States, in any suit, controversy, matter or cause, depending before him or them, and shall be thereof convicted, such person or persons so giving, promising, contracting, or securing to be given, paid or delivered, any sum or sums of money, present, or other bribes as aforesaid, and the judge or judges, who shall in any wise accept or receive the same, on conviction thereof, shall be fined and imprisoned at the discretion of the court, and shall forever be disqualified to hold any office of honour, trust, or profit under the United States."

No prosecution, it is believed, has ever taken place under the above section. Embezzling letters, &c.

By an act of congress, April 30th, 1810, sec. 18., "If any person, employed in any of the departments of the general post-office, shall unlawfully detain, delay, or open any letter, packet, bag, or mail of letters, with which he shall be entrusted, or which shall have come to his possession, and which are intended to be conveyed by post, or if any such person shall secret, embezzle, or destroy any letter or packet, intrusted to him as aforesaid, and which shall not contain any security for, or assurance relating to money, as hereinafter described, every such offender, being thereof duly convicted, shall, for every such offence, be fined, not exceeding three hundred dollars, or imprisoned, not exceeding six months, or both, according to the circumstances and aggravations of the offence. And if any person, employed as aforesaid, shall secret, embezzle, or destroy, any letter, packet, bag, or mail of letters, with which he shall be entrusted, or which shall come to his possession, and are intended to be conveyed by post, containing any bank note, or bank post bill, bill of exchange, warrant of the treasury of the United States, note of assignment of stock in the funds, letters of attorney for receiving annuities or dividends, or for selling stock in the funds, or for reviewing the interest thereof, or any letter of credit, or note for, or relating to payment of moneys, or any bond or warrant, draft, bill or promissory note, covenant, contract, or agreement whatsoever, for or relating to the payment of money, or the delivery of any article of value, or the performance of any act, matter, or thing, or any receipt, release, acquittance, or discharge of or from any debt, covenant, or demand, or any part thereof, or any copy of any record, or any judgment or decree, in any court of law or chancery, or any execution which may have issued thereon, or any copy of any other record, or any other article of value, or any writing representing the same; or if any such person employed as aforesaid, shall steal or take any of the same out of any letter, packet, bag, or mail of letters, that shall come to his possession, he shall, on conviction, for any such offence, be imprisoned not exceeding ten years. And if any person who shall have taken charge of the mail of the United States, shall quit or desert the same, before he delivers it into the post-office kept at the termination of his route, or to some known mail carrier, or agent of the general post-office authorized to receive the same, every such person, so offending, shall forfeit and pay a sum not exceeding five hundred dollars, for every such offence. And if any person concerned in carrying the mail of the United States shall collect, receive, or carry any letter or packet, or shall cause or procure the same to be done, contrary to this act, every such offender shall forfeit and pay, for every such offence, a sum not exceeding fifty dollars.

And by the 27th sec., "If any person employed in any department of the Post Office shall improperly detain, delay, embezzle, or destroy, any newspaper, or shall permit any other person to do the like, or shall open, or permit any other person to open, any mail or packet of newspapers, not directed to the office where he is employed, he shall, on conviction thereof, forfeit a sum not exceeding fifty dollars for every such offence. And if any other person Newspapers.

shall open any mail or packet of newspapers, or shall embettle or destroy the same, not being directed to himself, or not being authorized to receive and open the same, he shall, on conviction thereof, pay a sum not exceeding twenty dollars for every such offence. And if any person shall take or steal any packet, bag, or mail of newspapers from or out of any post office, or from any person having custody thereof, such person shall, on conviction, be imprisoned not exceeding three months, for every such offence, to be kept at hard labour during the period of such imprisonment.

"If any person shall enclose, or conceal a letter, or other thing, or any memorandum in writing, in a newspaper, or among any package of newspapers, which he shall have delivered into any post office, or to any person, for that purpose, in order that the same may be carried by post, free of letter postage, he shall forfeit the sum of five dollars for every such offence: and the letter, newspaper, package, memorandum, or other thing, shall not be delivered to the person to whom it is directed, until the amount of single letter postage is paid for each article of which the package shall be composed."

Cutting the mail bag, &c. And by the 20th sec., "If any person shall rip, cut, tear, burn, or otherwise injure, any portmanteau, valise or other bag, used, or designed to be used, by any person acting under the authority of the post master general, or any person in whom his powers are vested, in the conveyance of any mail, letter, packet, newspaper, or pamphlet, or shall draw, or break, any staple, or loosen any part of any lock, chain, or strap, attached or belonging to any such valise, portmanteau, or bag, with an intent to rob or steal any mail, letter, packet, newspaper, or pamphlet, or to render either of the same insecure, every such offender, upon conviction, shall for every such offence, pay a sum not exceeding five hundred dollars, or be imprisoned not exceeding three years, at the discretion of the court before whom such conviction is had."

And by the 21st section, "Every person who, from and after the passage of this act, shall procure, aid, advise, or assist, in the doing or perpetration of any of the acts or crimes by this act forbidden to be done or performed, shall be subject to the same penalties and punishments as the persons are subject, who shall actually do or perpetrate any of said acts or crimes, according to the provision of this act."

Rescue. By an act of congress 30th April, 1790, sec. 5, "If any person or persons shall, after such execution had, by force, rescue, or attempt to rescue, the body of such offender out of the custody of the marshal or his officers, during the conveyance of such body to any place for dissection as aforesaid, or shall, by force, rescue, or attempt to rescue, such body from the house of any surgeon, where the same shall have been deposited in pursuance of this act, every person so offending shall be liable to a fine not exceeding one hundred dollars, and an imprisonment not exceeding twelve months."

Enlisting in the service of a foreign prince or state, &c. By an act of congress 20th April, 1818, sec. 2, "If any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain, another person to enlist or enter

himself, or to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince, state, colony, district or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years."

No prosecutions have taken place under the above section, at least, none are reported in the books. To enlist or enter the service of a foreign prince, however, is a breach of that allegiance that every person owes, or is supposed to owe, to his country. Expatriation is not allowed by any law of the United States; no provision having yet been made by congress upon the subject. See this matter treated and the authorities collected in *Sergt. Const. Law*, 304.

By an act of congress passed April 10, 1816, sec. 18., "If any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting any bill or note in imitation of, or purporting to be a bill or note issued by order of the president, directors and company of the said bank, (bank U. S.) or any order or check on the said bank or corporation, or any cashier thereof; or shall falsely alter, or cause or procure to be falsely altered, or willingly aid or assist in falsely altering any bill or note issued by order of the president, directors and company of the said bank, or any order or check on the said bank or corporation, or any cashier thereof; or shall pass, utter or publish, or attempt to pass, utter or publish as true, any false, forged or counterfeited bill or note purporting to be a bill or note issued by order of the president, directors and company of the said bank, or any false, forged or counterfeited order or check upon the said bank or corporation, or any cashier thereof, knowing the same to be falsely forged or counterfeited; or shall pass, utter or publish, or attempt to pass, utter or publish as true, any falsely altered bill or note issued by order of the president, directors and company of the said bank, or any falsely altered order or check on the said bank or corporation, or any cashier thereof, knowing the same to be falsely altered with intention to defraud the said corporation or any other body politic or person; or shall sell, utter or deliver, or cause to be sold uttered or delivered, any forged or counterfeited note or bill in imitation, or purporting to be a bill or note issued by order of the president and directors of the said bank, knowing the same to be false, forged or counterfeited; every such person shall be deemed and adjudged guilty of felony, and being thereof convicted by due-course of law, shall be sentenced to be imprisoned and kept to hard labour for not less than three years, nor more than ten years, or shall be imprisoned not exceeding ten years, and fined not exceeding five thousand dollars.

By sec. 19., "If any person shall make or engrave, or cause, or procure to be made or engraved, or shall have in his custody or possession, any metallic plate, engraved after the similitude of any plate from which any notes or bills, issued by the said corporation, shall have been printed, with intent to use such plate, or to cause, or suffer the same to be used in forging or counterfeiting any of the

notes or bills issued by the said corporation ; or shall have in his custody or possession, any blank note or notes, bill or bills, engraved or printed after the similitude of any notes or bills issued by said corporation, with intent to use such blanks, or cause, or suffer the same to be used in forging or counterfeiting any of the notes or bills issued by the said corporation ; or shall have in his custody or possession, any paper adapted to the making of bank notes or bills, and similar to the paper upon which any notes or bills of the said corporation shall have been issued, with intent to use such paper, or cause, or suffer the same to be used in forging or counterfeiting any of the notes or bills issued by the said corporation ; every such person, being thereof convicted by due course of law, shall be sentenced to be imprisoned, and kept to hard labour, for a term not exceeding five years, or shall be imprisoned for a term not exceeding five years, and fined in a sum not exceeding one thousand dollars.




REPORTS OF CRIMINAL LAW CASES.

SUPREME COURT.

PHILADELPHIA, AUGUST, 1823.

<p><i>The Commonwealth, (at the instance of Edward Short,)</i> <div style="text-align: center;">vs.</div> <i>I. Deacon, Keeper of the Prison of the City and County of Philadelphia.</i></p>	<p style="font-size: 3em;">}</p>	<p>HABEAS CORPUS.</p>
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THIS case was fully argued in the Supreme Court room, before Chief Justice Tilghman, on the 11th and 14th instant. Messrs. C. J. Ingersoll and C. S. Coxe, for the prosecution, and Messrs. P. A. Brown and Keating for the defendant. On the 21st inst. the Chief Justice delivered the following decision :

PHILAD'A,
August, 1823.

 The Com'th
 v.
 Deacon.

TILGHMAN, C. J. It appears by the return to the habeas corpus, in this case, that Edward Short is detained, by virtue of a warrant of commitment, issued by Joshua Raybold, a justice of the peace, founded on the oath of John Wallace; by which Short is charged with the murder of James Trimble, in the county of Tyrone, in Ireland, and afterwards flying from justice. The murder is alleged to have been committed on or about the 26th of July, 1821. John Wallace and other witnesses have

Vol. II. 1

PHILAD'A.
August, 1823.

The Com'th
v.
Deacon.

been examined before me, and the cause has been well argued by counsel both for and against the prosecution.

Two questions are to be considered: 1st. Whether the evidence is such as would warrant a commitment for trial for murder, if the offence had been committed in Pennsylvania. 2d. Supposing the evidence sufficient, whether the warrant of commitment was legal?

I am by no means satisfied with the evidence. It proves, that about the 26th of July, 1821, there was an affray, at the town of Clogher, in the county of Tyrone, in Ireland, in which James Trimble received one or more violent blows on the head, by which his skull was fractured, and in consequence of which he died in a short time. An inquest was held on his body, but no copy of it having been produced, we are ignorant of the finding of the jury. A reward was offered by private persons, for the apprehension of Short, who fled, and could not be taken. Since his arrival in this country, he has confessed that he was in the affray, but denied that he was guilty of murder. Now, supposing that a homicide of some kind was committed, we are quite ignorant of its nature. And I think it might have been expected, that a copy of the coroner's inquest should have been produced. I certainly should have called for it had the offence been committed in Pennsylvania. On the whole, then, I should have inclined against the commitment for murder, had the case rested solely on the evidence. But a much more important question remains:—Ought the prisoner to have been committed, even if the evidence had been sufficient? He was arrested at the request of a private person, without the interference either of the British government, or that of the United States. It is a question in which the

peace of many persons is deeply concerned—persons who have fled from Europe, and sought an asylum in this country, where they thought themselves sure of protection.

PHILAD'A.
August, 1893.

The Com'th

v.

Deacon.

The counsel for the prosecution have rested their case upon the law of nations; by which, as they contend, the government within whose territory any offence has been committed, has an absolute and perfect right to demand the person of the criminal, to be delivered up, by the government in whose dominions he shall be found. In support of this proposition, they rely on the opinions of respectable authors, the practice of nations, and judicial decisions. It is proper, therefore, that each of these grounds should be examined.

Grotius is of opinion, that when a criminal has fled from justice, the government to which he flies is bound either to punish him according to his crime, or force him to leave the country, or deliver him up. This he lays down in broad terms, without distinction as to the magnitude of the crime. Yet he confesses, that for some ages past, the right of demanding fugitive delinquents has not been insisted on in most parts of Europe, "except in crimes against the state, or those of a very heinous nature. As for lesser faults, they are connived at, on both sides, unless it is otherwise agreed on by some particular treaty." (Grot. book 2. ch. 20. sect. 3, 4, 5, 6.) Burlemaqui follows the opinion of Grotius, verbatim. He adds, however, that Puffendorf is of different sentiments, "who pretends, that if we are obliged to deliver up a criminal who takes shelter among us, it is rather in virtue of some treaty, than in conse-

PHILAD'A.
August, 1823.

The Com'th
v.
Deacon.

quence of a common and indispensable obligation." (2 Burl. part 4. sect. 23, 24, 25, 26, 27, 28.) The opinion of Grotius is adopted also by Heincius, in his prelut in Grot. Vattel seems to have directed his attention principally to the case of sovereigns whose subjects have committed crimes within the dominions of others. And he is of opinion, that the offenders should either be punished at home, or delivered up. He does say, however, in general, "that the practice of delivering up is pretty generally observed with respect to great crimes, which are equally contrary to the laws and safety of all nations;" and that "assassins, incendiaries, and robbers, are seized every where, at the desire of the sovereigns in whose territories the crime was committed, and delivered up to justice." (Vatt. book 2. ch. 6. sect. 71—77.) These are the opinions in support of the absolute and positive duty to deliver up the offender, upon the demand of the sovereign in whose territory the crime was committed. But we shall find, that it is a point on which all authors have not agreed. There are great names on both sides. We have seen that Puffendorf, as quoted by Burlemaqui, founds the right of demanding a delivery of the offender on treaty. Martens is of opinion, that a sovereign may punish foreigners, whether they commit a crime in his dominions, or fly to them, having committed a crime in the dominions of another; "but in neither case is he perfectly obliged to send them for punishment to their own country, nor to the place where the crime was committed, not even supposing them to have been condemned before their escape." He adds, however, "that the general good seems to require, that those who attack immediately the safety of the state should not go unpunished; and, ac-

cordingly, in case of requisition, no sovereign refuses, directly, to take cognizance of such a crime." (Martens, book 2. ch. 3. sect. 22. p. 107. Philadelphia edition.) Lord Coke, (3 Inst. p. 180.) is strong and positive against delivering up. "It is holden, (says he) and so it hath been resolved, that divided kingdoms under several kings, in league one with another, are sanctuaries for servants, or subjects, flying for safety from one kingdom to another; and upon demand made by them, are not, by the laws and liberties of kingdoms, to be delivered; and this same hold is grounded upon the law in Deuteronomy, non trodes servur domino suo, qui ad to configuerit." Coke cites no case in which the point had been adjudged; but he mentions three memorable instances, which show the opinions and practice of the sovereigns of that day. Queen Elizabeth, in the 34th year of her reign, demanded of the French king (the great Henry 4th) Morgan and others of her subjects, who had committed treason against her. The answer of the king was, "that if these persons had machinated any thing against the queen in France, he could lawfully proceed against them, but, if the offence was committed in England, he had no right to take cognizance of it. That all kingdoms were free to fugitives, and it was the duty of kings to defend the liberties of every one in his own kingdom, and that Elizabeth herself had, not long before, received into her kingdom, Montgomery, the prince of Conde, and other Frenchmen," &c. &c.; and so, says Lord Coke, the matter rested. The 2d instance was, the demand made by Henry VIII. of England, of the king of France, to deliver up to him the cardinal Pool, being his subject, and attainted of treason. This demand was not complied with, though it must have been well

PHILAD'A.
August, 1893.

The Com'th
v.
Deacon.

PHILADA.
August, 1833.

The Comth
v.
Denson.

considered, since Henry had a treatise written in support of his claim. The third was the case of the earl of Suffolk, attainted of high treason by parliament, and demanded by Henry VII. of England, of Ferdinand, king of Spain. Ferdinand refused to deliver him; but was afterwards induced to do so, in consequence of the promise of Henry not to put the earl of Suffolk to death. This promise was basely violated by Henry, who, affecting to consider it as only personal, commanded his son, Henry VIII. to execute the earl after his decease, who as basely carried this command into effect, in the fifth year of his reign.

These are the cases mentioned by Lord Coke; to which he might have added that of Perkin Warback, an impostor, who contended with Henry VII., for the throne of England; and having fled to Scotland, was protected by the king of that country, against Henry VII., who demanded him. In opposition to the opinion of lord Coke has been cited a treatise by Mr. Wynne, entitled, "Eunomus," (Dialogue 3. sect. 67. p. 317.) In this treatise the author makes very free with the judge's opinion: he remarks, that Coke says, "it is holden," &c. "so it hath been resolved," but neither tells us when or where it was resolved, and that his examples from history are far from proving the point. Although lord Coke was as great a common lawyer as England ever produced, yet certainly he was not equally profound in his knowledge of equity, or the law of nations. Perhaps, indeed, his attachment to the common law gave him a prejudice against all others. Yet, when he says a matter has been resolved, I should think he might be relied on; for he certainly was not apt to speak without book.

It may be remarked, by the by, that Mr. Wynne does not seem to have been in all respects master of the law of nations. For in his argument against lord Coke's opinion, we find the following passage: "If a criminal flies from his own, to another state, for refuge, his own cannot seize him by evidence. The case, in this respect, is much the same as (though stronger than) that of pursuing an enemy's ship under the protection of a neutral port. In both cases you are first to apply to the justice of the country: if that is refused, you may resort to war, at your option." This would be reckoned strange doctrine at the present day. The marquis of Beccaria gives no direct opinion as to the right of a sovereign to demand the delivery of a fugitive; but from the whole scope and spirit of his thoughts, it is plainly to be seen that he was against it. (Beccaria, ch. 35. p. 134) Ward, in his treatise on the law of nations, seems to rest the matter on treaties or conventions.

PHILADA.
August, 1822.

The Comth
v.
Deason.

I will now take notice of what may be called objected cases; and they are but few. Col. Lundy's case, in the first year of William and Mary, is in 2 Vez. 314. Colonel Lundy committed a capital offence in Ireland, and fled to Scotland, where he was arrested and sent to England. The judges were consulted, and all agreed that he might be sent to Ireland for trial. The King vs. Kimberby is reported in 2 Str. 848. 1 Barnard. (K. B.) 225. and Fitz. 111. Kimberby committed a capital felony in Ireland, and having fled to England, was arrested on a warrant of a justice of the Peace, and on a habeas corpus the Court of King's Bench refused to bail him. He was sent to Ireland by virtue of a warrant from the secretary of state. In the case of the East India Com-

PHILAD'A.
August, 1893.

The Com'th
v.
Deacon.

pany against Campbel (1 Vez. 246.) it was said by the Court of Exchequer, that one may be sent from England to Calcutta to be tried for an offence committed there. The principal of these three cases is plain and undeniable. The territories where the crimes were committed, and to which the criminal fled, were parts of the same empire, and under one common sovereign. The King of England could have no privilege against the king of Ireland; being one and the same person. Calcutta is part of the British empire. The common good of the whole forbids an asylum in one part, for crimes committed in another. So, prior to the American revolution, a criminal who fled from one colony found no protection in another: he was arrested, wherever found, and sent for trial to the place where the offence was committed. On this principle the court of cassation, in Paris, decided O'Donn's case, in the year 1808, (2 Hall's Law Journ. 112.) O'Donn was convicted of robbery, in Genoa, and sentenced to nine years labour in irons, while Genoa was an independent government. He fled to France, enlisted in the army, and then did meritorious service. Afterwards, Genoa became united to the French empire, and it was made a question whether O'Donn was entitled to protection in France. It was held, that he was not: that the right of any law was founded, not on the privilege of the fugitive, but of the sovereign to whom he fled, and therefore ceased, on the union of Genoa with France. But there are two other judicial cases in England, in which it is supposed that the right of demanding a fugitive from a *foreign* country is recognized as the law of nations. The case of the King vs. Hutchinson is very shortly reported in 3 Kel. 785. (29th year of Charles II.) The following is the whole of the report: On a

habeas corpus, it appeared, that the defendant was committed to New-Gate, on suspicion of murder in Portugal, which (by Mr. Attorney) being a fact out of the king's dominions, is not triable by commission upon 35 Hen. 8. c. 3. s. 1. but by a constable and marshal; and the court refused to bail him." Now, there is nothing here like an intent to send the man to Portugal. But Sergeant Corbet, speaking of this case in the *King v. Kimberby*, (cited before,) said, that Hutchinson was sent to Portugal for trial. What was his authority for this assertion we know not; so that the matter is at least doubtful. But the authority most relied on, is the *dictum* of Justice Heath, in *Meer v. Kay*, 4 Taunton, 34. 43. on which Chitty forms his opinion in his treatise on criminal law, (1 Chitty, 16.) The court of Common Pleas gave no opinion on the point in question, in *Meer v. Kay*; but Heath, J. said, "it has generally been understood, that by *the comity of nations*, the country in which a criminal has been found, has aided the police of the country against whom the crime was committed, in bringing the criminal to punishment. In Lord Loughborough's time, the crew of a Dutch ship mastered the vessel, and brought her into Deal; and it was a question, whether we could seize them, and send them to Holland; and it was held that we might; and the same has been the law of all civilized nations."

PHILAD'A.
August, 1823.

The Com'th
v.
Deacon.

Having now gone through all the European opinions and authorities, I will make a few observations on them, before I consider what is far more important—the opinions and authorities of our own country.

That no crime should go unpunished, and that the government which protects a fugitive from justice, becomes the abettor, and in some measure the partner of his

PHILAD'A,
August, 1823.

The Com'th
v.
Deacon.

crime, is a beautiful theory, but attended, in practice, with every difficulty. If all nations had the same idea of crimes and punishments, and if all were equally upright and impartial in the administration of justice, there could be no cause of complaint, if the accused was always sent for trial to the place of his offence; indeed, that would be the most proper place, because, in general, there the evidence is to be sought. But it is not so. What some consider as a slight offence, is by others deemed worthy of death. In some, an impartial trial may be expected; in others, trial is but a cruel mockery. For these and other reasons, the theory of Grotius has not been adhered to in practice. He says himself, that for ages, it has not been the custom to demand the delivery of a fugitive, except in case of crimes against the state, and other heinous offences; and all who have adopted his opinion, mention crimes against the state as peculiarly those in which an offender should find no protection. Now, it must be confessed, that in a mild, paternal government, treason is the greatest of crimes. But when government becomes oppressive, the best citizen, with the best intentions, may be implicated in treason; and therefore it is, that the very crime which Grotius denounces as that which should be cut off from all asylum, is precisely the one to which, at the present day, an asylum is always granted by liberal and enlightened nations. There are at this moment, both in England and America, fugitives from France, Spain, Portugal, Savoy, and Naples, all guilty of treason by the laws of their respective countries; yet all living in undisturbed quiet, all trusting, with undoubting confidence, to the protection of the government, to which they have fled. To say nothing of ourselves: would England give one of these

people up? Or, rather, would it not be deemed almost an insult to demand a delivery? The most heinous crime, next to treason, is murder. Yet there the degrees of guilt are so widely different, that the nature of each case should be well considered, before a fugitive is given up. Murder in a duel is, undoubtedly, a great crime; but is it such, in the general estimation of nations, as would preclude the guilty fugitive from protection? The same remark is applicable to a murder in a tumult, where political and party dissensions run high. Such unfortunate cases partake much of the nature of civil wars, and cannot be compared to murder of an individual, for the base purpose of robbery. In short, a crime can scarcely be conceived, in which the degrees of guilt are not so various, that the sovereign on whom a demand is made, ought to exercise his own judgment, and determine, according to the circumstances of the case, whether or not the fugitive should be surrendered. He has a right to consider, also, whether the offence be such as falls within Grotius' rule of heinous. This is a matter on which there may be great difference of opinion. Nations not much engaged in commerce may not think forgery an offence deserving death. Not so the English. It is what they never pardon. They pursue it with unrelenting severity. In their treaty with the United States, murder and forgery were the only crimes in which the delivery of fugitives was stipulated. In their treaty with France, (at Amiens) fraudulent bankruptcy was added to murder and forgery. Now, though England may be excusable for prescribing an offence which touches her vital interest, can it be said, that another government, differently circumstanced, and wishing to act fairly and conscientiously towards all mankind, might not refuse to give up

PHILAD'A,
August, 1833.

The Com'th
v.
Deacon.

PHILAD'A,
August, 1823.

The Com'th

v.
Deacon.

a forger or fraudulent bankrupt to certain death? The more deeply the subject is considered, the more sensibly shall we feel its difficulties; so that, upon the whole, the safest principle seems to be, that no state has an absolute and perfect right to demand of another the delivery of a fugitive criminal, though it has what is called an imperfect right; that is, a right to ask it as a matter of courtesy, good will, and mutual convenience. But a refusal to grant such request, is no just cause of war. No nation has a right to ask the delivery of a fugitive, for the purpose of wreaking its vengeance upon him. All that can be said, is, that unless he be given up, others may be encouraged to transgress, by a hope of escaping punishment, by flight, and then an injury may be sustained. And, indeed, in case of neighboring nations, the argument is so strong as to be almost irresistible, except in cases attended with particular circumstances. It will probably be found, therefore, that between neighbors, this matter has generally been put on some convenient footing, either by convention or long usage. But the more remote two nations are from each other, and the more difficult the passage from one to the other, the less forcible will be the reasons for the demand, and the more doubtful the duty of delivering. It is manifest, that between nations separated by the Atlantic ocean, the inconveniences arising from an asylum to fugitives will be much less than between those who inhabit the same continent.

It will not be matter of wonder, therefore, if between the European and transatlantic nations, a different practice on this delicate subject should prevail from that which may be found necessary among the European na-

tions themselves. Let us see, then, what has been the practice, so far as concerns the United States of America. We are now in the 48th year of our independence, and yet it is not known that, in any one instance, a fugitive from Europe has been surrendered, except Jonathan Robbins, whose case turned upon our treaty with Great Britain. And it is worthy of remark, that in the celebrated speech of chief justice Marshall, on the floor of the house of representatives, in defence of the conduct of president Adams, at whose request Robbins was delivered up by judge Bee to the British government, there is not a suggestion, or intimation, that the president possessed any power independently of the treaty. Indeed, I know of but two instances where a demand, except under the treaty, has been made, and in both the delivery was refused; one was the case of the chevalier de Longchamps, a subject of the king of France, who, in the year 1784, was demanded of the executive council of the state of Pennsylvania, by the French minister, to be sent to France, and there tried, and punished, for an insult offered in the city of Philadelphia, to Mr. De Marbois, secretary of legation to the French embassy, and consul general of France. The council consulted the judges of the supreme court, and by their advice refused to deliver De Longchamps, who was punished, however, on an indictment in Philadelphia, for breach of the law of nations. (1 Dall. 3.) This was before the existence of the present federal constitution. But the other case which I am about to mention was since the adoption of this constitution. In the year 1793, Mr. Genet, minister of the French republic, requested of Mr. Jefferson, secretary of state, a warrant for the arrest of several persons, citizens of France, who had escaped from the

PHILAD'A,
August, 1823.

The Com'th
v.
Deacon.

PHILAD'A,
August, 1823.

The Com'th

v.
Deacon.

French ship of war Jupiter, after committing crimes against the republic. •The answer of Mr. Jefferson, in the following words, will be found in the first volume of American state papers, p. 175. "The laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender coming within their pale, is received by them as an innocent man, and they have authorized no one to seize, or deliver him. The evil of protecting malefactors of every dye, is sensibly felt here, as in other countries: but until a reformation of the criminal codes of most nations, to deliver fugitives from them, would be to become their accomplices. The former is viewed, therefore, as the lesser evil. When the consular convention with France was under consideration, this subject was attended to; but we could agree to go no farther than is done in the ninth article of that instrument, where we agree mutually to deliver up captains, officers, mariners, sailors, and all other persons being part of the crews of vessels, &c. Unless, therefore, the persons before named be part of the crew of some vessel of the French nation, no person in this country is authorized to deliver them up; but, on the contrary, they are under the protection of the laws."

In the conclusion of Mr. Jefferson's letter, he says, "I have not yet laid this matter before the president, who is absent from the seat of government; but to save delay, which might be injurious, I have taken the liberty, as the case is plain, to give you this provisionary answer. I shall immediately communicate it to the president, and if he shall direct any thing in addition, or alteration, it shall be the subject of another letter. In the mean time

I may venture to let this be considered as a ground for your proceeding." When this answer was given, General Washington was president of the United States, and General Hamilton, secretary of the treasury. It was at the time of a memorable crisis, when our government took its stand upon neutral ground, and it was necessary to reflect maturely on our duties towards foreign nations. And I believe that no government ever considered that important subject with more candor, or formed its resolutions with more integrity, good faith, and sound judgment, than did ours on that occasion.

PHILAD'A,
August, 1823.

The Com'th
v.
Deacon.

It may be presumed, that no change has taken place in the sentiments of the executive, with respect to the delivering up of fugitives from Europe ; because, in the instructions from Mr. Monroe, secretary of state, to our plenipotentiaries charged with negotiating a peace with Great Britain, which terminated in the treaty of Ghent, is the following passage: " Offenders, even conspirators, cannot be pursued by one power, into the territory of another ; nor are they delivered up by the latter, except in compliance with treaties, or by favor." Mr. Madison was president at the date of these instructions ; so that we have the opinion of every president since the formation of the government, except Mr. Adams ; and it is not known, or believed, that he ever dissented. But it is necessary that I should now advert to a decision of the late chancellor of New York, much, and deservedly relied on by the council for the prosecution. It is the case of Daniel Washburn, (4 Johns. Ch. Rep. 106.) who was brought before the chancellor on a habeas corpus, and charged with a larceny of bank notes in Upper Canada. He was discharged for want of sufficient evidence ; but

PHILAD'A,
August, 1823.

The Com'rs

v.
Deacon.

the chancellor was of opinion, that if the evidence had been sufficient, the prisoner might have been committed, "to the end that a reasonable time might be afforded for the government here to deliver him up, or for the foreign government to make the requisite application to the proper authorities here for his surrender." But who were the proper authorities, whether the executive of the state of New York, or of the United States, the chancellor thought it not necessary to discuss. I am sensible of the weight of an opinion delivered by Chancellor Kent, ~~for~~ whose character, both as a private citizen and an eminent judge, I entertain the very highest respect. No doubt he was strongly impressed with the convenience of that comity between New York and Canada, which is the basis of the practice of the nations of Europe, and the very great inconvenience which would result from the want of it. Whether the state of New York has tacitly consented to a mutual delivering up of criminals by her officers and those of Canada, I know not; nor is it my business to know whether she has a right to enter into such an arrangement. But if the principles laid down in Washburn's case, are to be applied to persons who fly from Europe, and take shelter in the United States, I cannot assent to them. The American government has never recognized the principle of delivering up fugitives, except when bound by treaty. By our consular convention with France, we agreed to give up seamen who deserted from French vessels; and by our treaty with England, (Jay's treaty,) we agreed to give up persons charged with murder and forgery. Both these treaties have expired, and in our subsequent treaties with England the article respecting delivering up has been omitted. I do not consider the treaty with England as merely declara-

tory, and of course, I cannot agree, that on the expiration of that treaty, we were open to a demand of all fugitives from the British dominions, whatever might be their crimes. On the contrary, I suppose that the treaty was intended to give to each nation a right that did not before exist, and that on its expiration, that right ceased, on both sides. That such was the understanding of our government it is impossible to doubt, when it is considered that this treaty was made about a year after Mr. Jefferson's letter to Mr. Genet. The American government has never demanded the delivery of any criminal who has fled from the United States to a foreign country. We all remember the case of Bradford, the leader of the insurrection in this state, in 1793, who fled to the Spanish territory, and remained there in security. It is certain that this matter of delivering up is an affair of state, in which the judges and inferior magistrates cannot act, but as auxiliary to the executive power. The demand of the foreign court is addressed to none but the executive, and no other power than the executive has a right to comply with that demand.

PHILAD'A.
August, 1823.

The Com'th
v.
Deacon.

I grant, that when the executive has been in the habit of delivering up fugitives, or is obliged by treaty, the magistrates may issue warrants of arrest, of their own cause, (on proper evidence,) in order the more effectually to accomplish the intent of the government, by preventing the escape of the criminal. On this principle we arrest offenders, who have fled from one of the United States to another, even before demand has been made by the executive of the state from which they fled. But what right is there to arrest, in cases where the government has declared that it will not deliver up? For what

PHILAD'A,
August, 1823.

The Com'th

v.
Deacon.

purpose is such an arrest? Can any judgment be given by which the executive can be compelled to surrender a fugitive? Most certainly not. If the President of the United States should cause a person to be imprisoned for the purpose of delivering him to a foreign power, the judges might issue a habeas corpus, and inquire into the legality of the proceeding. But they have no authority whatever to make such delivery themselves, or to command the executive to make it. If those principles be just, it follows, that under existing circumstances, no magistrate in Pennsylvania has a right to cause a person to be arrested, in order to afford an opportunity to the President of the United States to deliver him to a foreign government. But what if the executive should hereafter be of opinion, in the case of some enormous offender, that it had a right, and was bound in duty to surrender him; and should make application to a magistrate for a warrant of arrest? That would be a case quite different from the one before me; and I should think it imprudent, at the present moment, to give an opinion on it. Every nation has an undoubted right to surrender fugitives from other states. No man has a right to say, I will force myself into your territory, and you shall protect me. In the case supposed, the question would be, whether, under the existing constitution and laws, the president has a right to act for the nation, or whether he must wait until congress think proper to legislate on the subject. The opinion of the executive hitherto has been, that it has no power to act; and should it ever depart from that opinion, it will be for the judges to decide on the case as it shall then stand. Neither do I give any opinion whether the executive of the state of Pennsylvania has power to cause a fugitive criminal to be arrested for

the purpose of delivering him up. But confining myself to the case before me, in which the arrest was made at the request of a private person, I am of opinion that there is no law to support it; and therefore the prisoner is entitled to his discharge.

PHILAD'A.
August, 1823.
The Com'th
v.
Deacon.

GENERAL SESSIONS,

NEW YORK, JUNE, 1822.

The People
vs.
Jacob Barker. } MISDEMEANOR.

Maxwell, District Attorney. *Price* and *Bunner*, for the People.

Jacob Barker, in propria persona.

Jacob Barker was charged at common law, and under the statute, for sending or delivering a challenge, pursuant to the act of the legislature, passed 1816. To which he pleaded not guilty. He was tried in May Term, and found guilty on all the counts; and at this term he moved in arrest of judgment, (and was heard at great length,) on the grounds detailed in the following decision :

RIKER, Recorder. With regard to your objection, Mr. Barker, we cannot allow to it the weight you demand. We are here to administer justice agreeably to the facts, as found for us by the jury, and the law of the

N^W YORK,
June, 1832.

~~~~~  
The People  
v.  
Jacob Barker.

land, as applicable thereto. If there are any apparent difficulties in the case, they must arise, as you suggest, from the blending of the common law and the statute; and that is your misfortune.

In the indictment there is a count on each. You are indicted in pursuance of the act of the legislature of 1816, for the suppression of duelling, for sending or delivering a challenge to David Rogers, on the 29th January last. The indictment also embraces a count as at common law for the same offence on the 6th February. The punishment at common law is fine or imprisonment, or both, in the discretion of the court. According to the statute, the penalty is disfranchisement, or inability to hold any office under the government of the state. The question of fact, whether you did send a challenge to Mr. Rogers, or not, was fairly submitted to a jury of the country, and they returned a verdict against you. You wished the matter to be further examined and discussed, and you were heard at great length against the verdict of the jury. You argued on that occasion,

1st. That the jury found their verdict on insufficient evidence.

2d. That they returned a verdict founded on chance; and,

3d. That the statute, under which you was tried and convicted, was originally unconstitutional, and had at any rate been abrogated by the new constitution of the state.

The court are unanimously of the opinion that it would not be just to inflict the penalty of both the laws ; and we cannot take up the general verdict against you, and impose the cumulative penalties which that verdict would seem to sanction, without rendering two separate judgments. The verdict and the record, however, you must take as they are, for the ground of your writ of error, and we must proceed to pronounce such sentence as we conceive that our duty enjoins.

N<sup>W</sup> YORK,  
June, 1892.  
The People  
v.  
Jacob Barker.

As at common law, however, we shall not consider the verdict ; for, in the first place, we on the trial considered only the statutable offence. -The proof not having sustained the count at common law, we put it to the jury only as an offence against the statute, though they found a general verdict against you. Should we go farther now, it would be inflicting a double punishment, and contrary to the testimony in the cause.

You say, first, that the jury found a verdict against you on insufficient evidence. The court can only say, upon this head, that the jury had your letter to Rogers of the 29th of January before them, as well as all the other evidence of the case, and they found a verdict against you. And we are not prepared to say that evidence was not sufficient.

As to the second ground, that the jury found a verdict against you on chance, you brought the declarations of jurors to prove that the jury agreed, if nine of the panel should unite in a verdict, the other three should fall in and find with them. Such conduct would undoubtedly be reprehensible ; and this court takes this occasion to

N<sup>W</sup> YORK,  
June, 1822.

~  
The People

v.

Jacob Barker.

say, that nothing would be more alarming than for our juries to adopt any other method of making their verdicts than the true merits according to the evidence.

The Recorder illustrated this opinion with some feeling, and stated impressive cases which might occur if there should be a recurrence of such a practice; and continued :

We have no hesitation to say, that that objection would be fatal if established by legal evidence; but you have only the proof which some of the jury themselves gave; and it is a well-settled point, that a jurymen cannot be heard to disparage his own verdict.

The proof must be derived *aliunde*, and no such proof is produced. To this doctrine we have the cases of *Dana v. Tucker*, decided in our supreme court; (4 Johns. Rep. 487.) the case of *The People v. John Francis and John Jones*, also decided in this very court, in the year 1816, Judge Radcliffe, mayor, presiding; and the question, in fact, may be considered as settled beyond controversy.

In those cases the depositions of some of the jurors were offered, and rejected upon the principle we have mentioned.

But your third and great objection is, that the statute under which you have been tried and convicted is abrogated by the new constitution. In the first place, you say, that by the new constitution all test oaths are abolished, and that the law in question, containing one, is


therefore null and void. The second section of the statute, containing the oath, the court themselves do not find any hesitation in saying is abrogated by the new constitution; still, however, it does not follow that the rest of the statute is annulled: far from it. An act of the legislature which expressly repeals a particular clause of another act, does not repeal the whole act, but, in legal construction, confirms the remaining clauses; and *a fortiori*, the repeal of a particular clause of an act, by implication, leaves the other clauses in all their force. The statute of 1816 remains in full effect as to its disenfranchising qualifications against you.

N<sup>W</sup> YORK,  
June, 1832.

The People  
v.  
Jacob Barker.

Again; you say the act is unconstitutional, because it disfranchises a citizen, and renders him ineligible to office, without the commission of an infamous crime; and finally, that it inflicts an unusual punishment, whereas the constitution forbids the infliction of cruel or unusual punishments. Of the power of the court to decide on these questions of unconstitutionality, we have here first to remark, that the court entertains no doubt that power does unquestionably rest on every legal tribunal. The constitution of the land binds equally the legislature and the courts; and the courts, in the exercise of their legitimate functions, may decide, when called upon, that the legislature has transcended its authority. If the legislature, for instance, in some act it passes, shall enjoin religious or test oaths, in direct contravention of the constitution, the great charter of all our rights, the courts will declare that act unconstitutional and void. And, again, our constitution expressly disqualifies any man from holding the office of judge over sixty years of age: but if by a law of the legislature to that effect, a judge,

N<sup>W</sup> YORK,  
June, 1892.

  
The People  
v.  
Jacob Barker.

regardless of the constitutional restriction, holds on still beyond that age, and, we will suppose, tries and convicts a person of a capital offence, and passes sentence on him, in pursuance of which he is executed, the judge would be a murderer. He had no more right than any other citizen to doom that fellow-citizen to death; and if tried before a court, that court must pronounce that judge guilty of murder. If, in a word, the people in their supreme authority impose restraints upon the legislature, the courts must follow the sovereign dictation of the people, and disobey the legislature.

And now, of the constitutional points in question: And first, of that which ordains, that "no citizen shall be disfranchised but by due course of law, and the trial of his peers." On this objection a very few words will be sufficient. A grand jury has found an indictment in due form against you, and a jury of your peers have heard your trial under that indictment, and found you guilty. You are, therefore, convicted in due form of law; and we cannot agree with you, that the legislature are inhibited from disfranchising a citizen but on conviction of an infamous crime.

We come next to consider what we are to understand by unusual punishments. In 1688, when William and Mary came to the throne of England, on the abdication of James, this act, which we have copied, was first introduced to restrain an inhuman practice, which had crept into the law, of cutting off the ear, slitting the nose, and maiming the persons of offenders. And this act has continued ever since. But what has been the construction of it, and the practice under it? Men have

been disfranchised and deprived of their eligibility to office in every period of the law since, and the exception now taken was never heard of before. Besides, the direct operation of many of our most wholesome laws virtually disfranchises men every day. You contend that the right of being elected to office, and of voting for men to office, are correlative, and must exist together, or both perish. How, then, can you reconcile with the constitution the provisions of the law which effectually prevent a man from being eligible to office, who may happen to be actually imprisoned for debt; and where, on the other hand, is the elector's boasted privilege, when perhaps his favorite candidate may be confined under process for debt, or, perhaps, serving out a most ungracious sentence in the penitentiary or state prison? Or, again, where, even in a case of a different description, that candidate holds a judicial office, and so cannot be elected by the constitution to any office in the gift of the people? and so of a clergyman, who, under our state constitution, can hold no political office? Other cases might be pointed out if necessary.

N<sup>W</sup> YORK,  
June, 1892.  
The People  
v.  
Jacob Barker.

Therefore, the defendant's points have all failed him, and we shall conclude by repeating our opinion, that the statute of 1816, to restrain duelling, is only annulled as to the 2d section, which requires the test oath, and is valid in all the remaining parts, and that by the finding of the jury we must pronounce on you the sentence of the law. We feel constrained, also, to pronounce one word of reprobation on the direful practice of duelling, to which the defendant himself assented most fully in his argument. It is a practice most abhorrent to reason, to humanity, and to religion. By it many of our

N<sup>W</sup> YORK, best citizens have been destroyed—many a worthy family rendered miserable. We are bound by every sanction to lend our aid to extinguish it. The sentence of the court, therefore, is, “that you be incapable of holding, or being elected to, any post of profit, trust, or emolument, civil or military, under this state.”

June, 1822.  
 The People  
 v.  
 Jacob Barker.

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## GENERAL SESSIONS.

NEW YORK, SEPTEMBER, 1823.

*The People*  
 vs.  
*Samuel B. H. Judah.* } LIBEL.

*Hugh Maxwell*, District Attorney, and *William M. Price*, Counsel for the prosecution.

*Messrs. Bogardus, Van Wyck, Fay, and Scott*, Counsel for the prisoner.

Postpone-  
 ment of trial.  
 See 1 Crim.  
 Law Cas. 482.

The indictment in this case had been found in July term last, and the case was now moved for trial by the District Attorney.

Mr. Van Wyck of counsel for the defendant, moved for a further continuance of the case, in support of which he read affidavits stating that no information had been received from A. Burr, Esq., the counsel which had been employed by the defendant to prosecute his application to the supreme court for a certiorari, and that he had been guilty of no negligence in his efforts to procure the

decision of that court. Mr. Scott, on the same side, recapitulated the facts set forth in the affidavits, and enforced the reasons that had been offered by his associate counsel. The public prosecutor waived a reply; and the Recorder, in pronouncing the unanimous opinion of the court, expressed very palpable and satisfactory reasons why the motion was refused.

NEW YORK,  
Sept. 1823.

~  
The People  
v.  
Judah.

Mr. Van Wyck then renewed his motion for a postponement of the trial, on the ground of the absence of five very material witnesses for the defendant. This motion was also grounded upon an affidavit of the defendant, averring that one of the witnesses, as he was informed and verily believed, was at Boston, one at Morristown, N. J., one (Dr. Francis) at Albany, and two others in different parts of this state. The motion was supported at considerable length by Messrs. Bogardus, Van Wyck, and Scott, in behalf of the defendant.

The court overruled the motion, and stated, that as process from this state cannot compel the attendance of persons in Boston or Morristown, the affidavit presented no sufficient ground for the continuance of the case, so far as related to those two witnesses. For witnesses in our own state fourteen days were allowed; and more than that length of time had been suffered to elapse since the decision of the supreme court in August, if any such decision had been made. The defendant had been indulged with as ample time as was allowed in civil cases, or even in cases of life and death. The court were, therefore, unanimous in refusing the motion, on the ground that the defendant had not used due diligence to procure his witnesses, if they were necessary for his defence.

1 Crim. Law  
Cas. 72. See  
also, p. 29, 30.

N<sup>W</sup> YORK, The case of Mrs. Foot was adverted to by the court, as a  
Sept. 1823. much stronger one than the present, in which a similar  
motion had been denied.  
The People  
v.  
Judah:

Mr. Bogardus here abandoned the defence.

Mr. Van Wyck claimed to be informed who were the prosecutors in the action, and stated that Dr. Francis (as he was advised) had expressed an acknowledgment of satisfaction in the case, and that the other persons named in the indictment as persons libelled, did not solicit nor desire the prosecution of the defendant.

The court decided that, as it was a case in which the Attorney for the people prosecuted, it was not competent to inquire who might have solicited it, especially as it was not in the power of individuals to compromise or control it.

A jury was then empannelled and sworn, and the trial proceeded.

- H. Maxwell, Esq., District Attorney, in opening the case to the jury, remarked, that it was an indictment for a libel, charging the defendant with the publication of a libellous book, entitled "Gotham and the Gothamites." In the performance of his public duty he had selected four libels which it contained, bearing upon different respectable individuals, who were grossly and wantonly aspersed by the author. It certainly was not necessary, nor did he conceive it to be proper, to swell the indictment to an unwieldy size, by including in it all the libels which that

volume contained. In the selection he had made, four instances had been taken of individuals of different professions, pursuits and circumstances in life, which would indicate the general and widely-extended malice of the author, against the most respectable men in our city. In the range of his rancour, it would be seen that mechanics, merchants, physicians, lawyers and divines were all included. Whether the book was published for the purpose of exciting public feeling, to fill his pockets, or gratify his malignity, would be left for the defendant to explain. Never had a publication been issued, within his knowledge, in this country, containing so many wicked, false and malicious libels as the present.—It had been inquired by the counsel for the defendant, who are the prosecutors? To this he could readily reply, that, as public prosecutor, he (Mr. M.) had taken up the book, and framed the charges, without consulting the individuals who were named in the indictment. There were many who would doubtless have come forward and made their complaint; but, standing in the relation which he did to the community, he had thought it most comported with the ends of public justice, to select the individuals as he did, from various professions and different ranks in life..

N<sup>W</sup> YORK,  
Sept. 1823.  
The People  
v.  
Judah.

The two first counts in the indictment were for a libel, (the one for a printed, and the other for a manuscript one,) on General Jonas Mapes, of this city; a man whose character for industry and integrity was above reproach, and whose conduct as a military officer during the late war was unexceptionable. He was now moving in the ranks of private life, with a respectable family, and a property acquired by honest exertion. He had been

N<sup>W</sup> YORK,  
Sept. 1823.

The People  
v.  
Judah.

elevated to an honorable eminence by the confidence of the people, and whilst reposing in the shade of retired life was attacked in the most wanton and infamous manner by the defendant. Mr. Maxwell had not, he said, deemed it necessary to go and inquire of such a man, will you prosecute the libeller: had he done so, what would have been the answer? The veteran citizen would have said no to the application;—my life and my character, he would have replied, are a shield against reproach. It is not necessary that I should step forth to defend them. When their purity and integrity are assailed, there are laws in the community to punish the assailant. A public prosecutor has been appointed for the very purpose of protecting the rights of the citizen; and courts of justice have been instituted to inflict exemplary punishment for their violation. General Mapes is a mechanic; but it is not mechanics alone that the defendant has attacked. Even the ministers of our holy religion are not exempted from the reach of his malice.

The third count in the indictment recites a libel upon Professor Moore, of Columbia College; a man than whom no one devotes himself more assiduously to the education of youth, and the functions of his sacred duty. He is a gentleman who takes no part in the passing contentions of the day. He participates in none of the conflicts of party politics or domestic strife; and yet he is drawn from his retirement, exposed to the vulgar gaze, and held up to the public eye as an object of scorn and contumely.

The fourth and fifth counts in the indictment consist of libels upon Samuel S. Gardiner, Esq., and Dr. John W. Francis, of this city. The former is a counsellor at

law, holding a respectable rank both at the bar and in society. He was a member of the last legislature, and possesses an irreproachable character. The latter is a physician, well known in this city, of high professional attainments, and of unblemished reputation.

N<sup>W</sup> YORK,  
Sept. 1823.

The People  
v.  
Judah.

Thus it will be seen, said Mr. M., that the defendant, if we prove him to have been the author of the book, has libelled all the professions in the community. It is but a small comparative number that the indictment embraces. There is scarcely any man of consideration in our city whose character, either public or private, has not been directly or indirectly attacked. Mr. Maxwell then read from the book entitled Gotham and the Gothamites, the passages laid in the indictment, and concluded by remarking that he had no wish to excite any sensibility in the minds of the jury, beyond that measure of honest indignation which every fair and honorable man must feel at the exhibition of such a wanton and scurrilous libel.

The witnesses were then called, and Mr. Z. Homans testified, that he purchased the book entitled Gotham and the Gothamites at the bookstore of Solomon King.

James Van Orden, the printer of the book, testified that the contract for printing it was made with Solomon King, and the copy furnished by him. He also identified four pieces of manuscript of the book, to which the testimony of subsequent witnesses relate.

Robert Maywood and Edward M. Murden, both testified their knowledge of the defendant's hand-writing, and

N<sup>W</sup> YORK, identified the pieces of manuscript referred to by Mr. Van Orden, as being in the hand-writing of the defendant.

Sept. 1823.

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The People
v.
Judah.

Mr. Murden also proved the signature of the defendant to a bond of indemnity executed on the 2d of June, 1823, in which the defendant acknowledged himself to be the author of the book entitled *Gotham and the Gothamites*, and bound himself to save harmless the before-named Solomon King from any prosecution, costs, or damages, to which he might become subject by the publication of the same.

An anonymous letter was then offered in evidence by Mr. Maxwell, post-marked June 26th, and addressed to Dr. Townsend, of this city, stating in substance that a publication had just been issued from the press, containing a severe libel upon his (Dr. T.'s) character, and advising him to possess himself of the same, for the purpose of disproving the charges which the publication contained.

In this stage of the case a side-bar consultation was held between the defendant and his counsel, when Mr. Van Wyck stated to the court that the cause having been brought to trial at this term contrary to his expectation, so that the defendant was deprived of witnesses, who, if they could not relieve the case, might at any rate present circumstances of mitigation, the defendant, as advised by his counsel, had determined to make no further resistance to the prosecution. Mr. V. W. further stated, that the defendant, as he was advised, was only nineteen years of age: that he had perhaps been led on to this act of in-

discretion by the instrumentality of others ; and he hoped at all events, that the court in measuring out the punishment would confine its consideration to the cases laid in the indictment ; more especially as this prosecution could be no bar to future indictments at the instance of other individuals, and which the court would have no power to restrain or control. He also expressed the hope and expectation, that the court would allow the defendant a reasonable time in which to lay the affidavits in support of the circumstances of mitigation to which he had alluded.

N^W YORK,
Sept. 1823.

The People
v.
Judah.

Mr. Maxwell observed, that he should expect the court to look at the whole book, and decide upon the case with reference to the whole subject matter. This would be necessary, as in all other cases, for the purpose of determining the *quo animo* of the defendant. He therefore gave this notice, that the defendant might prepare and offer his affidavits of mitigation, co-extensive with the whole book.

Mr. Price, of counsel for the prosecution, also referred to the case of Harry Croswell, who was indicted many years ago for a libel upon Thomas Jefferson. He was the publisher of a newspaper called the Balance, and the court permitted newspapers published by the defendant, other than that containing the libel, to be given in evidence, for the purpose of showing the *quo animo* of the defendant.

Some colloquial discussions ensued, when the Recorder observed, that it was the defendant's right to submit affidavits to the court in mitigation of the punishment.

N^W YORK,
Sept. 1823.

The People
v.
Judah.

1 Crim. Law
Cas. 354.

So, also, it would be competent for the public prosecutor to offer affidavits in aggravation of the defendant's crime. The Recorder, then, in a brief but appropriate manner, charged the jury, that in cases of this sort, they were made, by the constitutional law of this state, judges both of the law and the fact. All that was left for the court to do, in the present case, was to state what, in their judgment, constituted a libel, and their opinion of the evidence adduced to prove it. They should not attempt—neither indeed was it in the power of the court, to control the verdict of the jury. There were two prominent questions which the jury were called upon to try: 1st. Whether the publication is in fact libellous; and 2dly. Whether, if it is so, the defendant is the author or publisher. A libel was a writing, either printed or otherwise, which represented a man in a light to expose him to public ridicule or contempt. If this publication was of such a character, it would be, clearly libellous. The next question would be, whether the testimony was such as would warrant the jury in rendering a verdict against the defendant. On this point His Honor briefly adverted to, and recapitulated the testimony. He observed, that the liberty of the press was a right which should be sedulously guarded; and in canvassing the pretensions of candidates to public office, and in examining their claims and qualifications for official trusts, much latitude should be allowed; but if it should be permitted to invade the sanctity of private repose, and to draw into public discussion the merits or demerits of individual character, no person in the community could be safe. Our wives and our children might become subjects of public animadversion, and the greatest blessing of a free government be converted into its bitterest curse.

Such a state of things would be at war with that liberty of the press which every good citizen was bound to support and defend.

NEW YORK,
Sept. 1823.

The People
v.
Judah.

The jury retired, and in a few minutes returned into court with a verdict of *Guilty*.

The District Attorney then suggested to the court, whether it was not expedient and proper that the defendant should be taken into custody. It appearing that he was under a recognizance himself in the sum of \$5000, and two sureties in the sum of \$2000 each, the court held that the bonds were sufficient.

General Bogardus, of counsel for Judah, interposed an objection, on the ground that the averments relative to the identity of the persons said to have been libelled, had not been proved. J. M., he said, were the initials of many other persons in the city besides General Mapes. On the authority of the case of *Van Vechten v. Hopkins*, in *Johnson's Reports*, the court overruled the objection. The defendant then made a long address to the court; after which the Recorder proceeded to pass sentence, which, as he observed, the court was compelled to do, after a fair hearing by a jury of the country. There can be no doubt, said the Recorder, that you wrote the book. The handwriting of the original manuscript was clearly proved; independently of which, a bond of indemnity, under your own hand, was shown to have been executed by you, to save harmless Solomon King, the publisher, and in which you expressly avow yourself to have been the author of the work. The only remaining questions are, whether the publication be libellous or not; and if so, what shall be the measure of

N'W YORK,
Sept. 1823.

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The People  
v.  
Judah.

punishment. The law has laid down a clear and certain rule for the definition of every offence for which a man can be arraigned. It is elucidated in such a way that it is scarcely possible for a man not to know whether he has committed a crime or not. The Almighty has likewise given us a moral sense to distinguish between right and wrong. The social relations—parental duty, and filial affection, for instance, are the spontaneous sentiments of our nature; and equally perceptible is the moral feeling that it is wrong to injure our fellow-man. But of all offences, those are the most strange in which the offender attempts to injure others without benefit to himself. Of this description is the libeller. The felon and the robber expect to enrich themselves by the spoils of their victim; but the defamer takes away from a man his reputation, without adding to his own. In the language of the poet—

“ Who steals my purse steals trash—\*\*\*\*\*  
But he who filches from me my good name,  
Robs me of that which not enriches him,  
And makes me poor indeed.”

Most justly, therefore, does our law class libels with crimes. It is in vain to say that the liberty of the press is in danger by restraining its licentiousness. In its honest and proper use it is a blessing: its abuse is a curse. The line of distinction between them is as clearly drawn as in the use and abuse of the elements. The element of fire, for instance, is indispensable to the wants of man. It is a valuable agent for the preservation of health. It prepares his daily food—protects him from the vicissitudes of weather, and the inclemency of frost: these

are its legitimate uses. But is this an excuse for the incendiary? Will this protect the wretch who sets fire to his neighbor's house? The author who writes with the honest purpose of correcting the vices of the day, who exposes iniquity and fraud—or who canvasses, with freedom and fairness, the pretensions of a man who aspires to public trust and favor, should be viewed with a favorable eye. Truth is useful to the public, when it relates to public interests and objects; and if the views of the writer are correct and honest, his efforts will be crowned with the public approbation. But it is impossible that we should authorize attacks on individuals, which are calculated, without doing any good whatever, to inflict pain and distress. You say in your address to the court, that your book is not libellous. Look to that portion of it contained in the indictment.

N<sup>W</sup> YORK,  
Sept. 1853,  
The People  
v.  
Judah.

The Recorder then read from the book those paragraphs relating to General Mapes, Dr. Francis, S. S. Gardiner, Esq., and Professor Moore. They are too abusive in their character, and too disgraceful to the author, to justify a republication. In the course of his comments upon them, the Recorder, with suitable reprobation, pointed out their malignant character and injurious tendency. He would appeal to any unbiassed and unsophisticated mind, to say whether it was not an unkind and unfeeling attack upon General Mapes: a man who had been the builder of his own fortunes; a man of inoffensive and unassuming manners, of integrity, respectability, and worth. The libel ridiculed his profession, and held him up to public scoff and ridicule. It was impossible to excuse such conduct. Dr. Francis, also, a man eminent in his profession, was derided and ridiculed. Among

N<sup>W</sup> YORK,  
Sept. 1823.

The People  
v.  
Judah.

other things he was scoffed at for wearing spectacles. This probably arose from a defect of vision ; but suppose it did not—where is the advantage to the public that an individual should be lampooned on account of his dress ? It was not to be endured. Such licentiousness would produce a shock and convulsion in society. The recesses of families would be broken into, and society un- hinged. If the character of individuals is thus to be torn in piéces, the consequences would be, either open violence, or private assassination. Mr. Gardiner, who is next at- tacked, is a respectable member of the bar, and of the legislature. How has he deserved the abuse you have bestowed ? If in these cases the reputation of those who were attacked have suffered no injury, it is owing to their weight of character, and the insufficiency of the libel to depress them. But continual droppings will wear the solid rock, and to perpetual attrition even adamant will yield.

But beyond these cases, you go to a man unconnected with the bustle of the world : to Professor Moore. He is a gentleman of great attainments in literature ; one of the best Greek scholars in the country, and a valuable officer in our university. He mingles in none of our political strifes ; possesses a pure moral character, and valuable reputation, and yet he is held up to ridicule !— he is described as “ a fellow ”—a sort of language which ordinary courtesy does not appropriate to gentlemen— represented as wanting ability, and in dress and appear- ance resembling an ourang-outang : this, too, in a par- agraph in which you say he “ has the ten commandments in his eye, for he seems determined to look nothing of heaven above, or of the earth beneath,” is done by turn-

ing one of your own commandments, and of mine, into ridicule. And yet in your address to the court you have said the book is not libellous! Either you or the court and jury are mistaken. And have we been asleep, or could the jury, unless infatuated, say, without a palpable violation of their oaths, that it is other than a scandalous libel—a libel too of a very malignant character? To lash vice is justifiable; but this book is calculated to create breaches of the peace—to excite the angry passions—to embitter society, and to scatter its path with thorns. A more signal proof of this tendency cannot be furnished than by your own conduct. You have pressed it upon the court, that so great was the exasperation of the public mind you could not have a fair trial in this city. If what you said be true, of a great and respectable community, what must have been its moral sense of the cause that excited it? The court indeed believed that an impartial jury could be found; and has no doubt but you greatly overrate the effect of the publication upon the mass of the people. But your own showing tests the bearing of the libel upon the peace of society. In these remarks I confine myself to the parts of the book laid in the indictment. Hearing of the public proceedings to be had upon it, I have not read a syllable besides. But those passages, in the opinion of the court, contain as gross and palpable a libel as was ever framed by mortal man. You are a student at law: any book of jurisprudence you opened would show you it was so. You must have perfectly well known that it was a libel; and there is conclusive evidence that you did so regard it. Otherwise, why give King a promise of indemnity? The author of a praise-worthy volume would not dishonor himself by giving such a bond. Indemnity for what? Would

N<sup>Y</sup> YORK,  
Sept. 1823.

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The People
v.
Judah.

NEW YORK,
Sept. 1823.

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The People
v.
Judah.

the writer of "a moral, a virtuous, a religious work,"—a treatise, for instance, on filial piety, think of giving a bond of indemnity to the publisher? But this, conclusive as it is, is not the only evidence of your consciousness that the book was a libel. "After it was published, you wrote an anonymous letter to an individual, in which you told him he was terribly libelled in a book called Gotham and the Gothamites, published by one Solomon King, who was only *the dupe of "higher foes."* Under these circumstances you stand, not only guilty of writing the libels, but, according to your own view of the subject, with a perfect conviction of their libellous character.

Having thus stated what we think is the law as applied to the case, it now becomes our duty to pronounce in what way the offence shall be punished. As the law formerly stood, libels were punished by fine or imprisonment or both, and a recognizance for future good behavior. Under that law Mr. Frothingham was imprisoned for a libel on Gen. Hamilton, and Mr. Greenleaf was fined \$700 for a libel on Sir John Temple. Our legislature, in its wisdom, by the 3d section of an act relative to libels, passed in 1805, have restricted the power of courts, and declared that they shall not imprison in case of a libel for a term exceeding eighteen months, nor impose a fine exceeding five thousand dollars. The court is unanimous in the opinion, that under this act, they may fine or imprison, but cannot do both; nor is it perfectly clear that they have the power to put the party under a recognizance. As this is so, whichever alternative we select, we think it should be severe. The public prosecutor has pressed upon us, no doubt from the best and fairest motives, without any personal hostility, but for the ends of public justice, that we should

imprison you. And there are good reasons why we should do so. You are a young man, and under age. If we fine you, the payment must come from some of your friends. This would be punishing an innocent person for the offence of the guilty. A punishment of that kind would be most likely to prevent a repetition of the crime. There are difficulties either way. If we imprison, some will think the term we assign too long; others, that it is too short. Some will think we should imprison; others, that we should fine you; and of those who agree we should fine, some may think us unreasonably severe, and others unreasonably indulgent. None have a right to censure the motives of our judgment, but it is the right of all to form their opinion. It will be difficult to make either side sensible that we have taken the best course; but so long as the tribunals of justice make the public good their guide, they will be supported by general approbation, and by their own consciences. There are reasons why we should impose a fine. You have respectable connections, whose feelings are to be regarded, though they should not have a controlling influence. You are a young man coming into life: you have received from eminent men commendation of your talents; but you have shamefully abused those talents. Imprisonment may sully your character and prospects. Independent of that, Dr. Hammersley, a respectable physician, has sent us a certificate, stating that he has attended you for some years for a pulmonary affection of the chest, and that imprisonment might injure your health. On the whole, the court have concluded to fine you, and the fine must be large—so large as perhaps may cause imprisonment.

N^W YORK,
Sept. 1823.


The People
v.
Judah.

N^W YORK, The Recorder then sentenced the prisoner to pay a
 Sept. 1823. fine of four hundred dollars, and to stand committed until
 The People the judgment is complied with.
 v.
 Judah.

OYER AND TERMINER.

NEW YORK, JULY, 1800.

The People
 vs.
Richard D. Craucher. } RAPE.

Present—Honourable *Egbert Benson*, Justice.
 Honourable *Richard Varick*, Mayor.
 Honourable *Richard Harison*, Recorder.
Selah Strong, Alderman.

Cadwallader D. Colden, Attorney General.

Brockholst Livingston, } Counsel for the Prisoner.
Washington Morton, }

The facts of this case were as follows. The prisoner was indicted in the usual form, with committing a rape on the body of Margaret Miller, a young girl of 13 years of age, the daughter of Mrs. Stockhaver, whom he, in a few weeks after, married.

The story told by the girl was as follows: "Mr. Croucher came to my mother's, Mrs. Stockhaver's, I don't know how long ago, to sell some stockings: he used to come every day. One night he asked my mamma, if she would let me go and scrub his room for him, at

Mr. Ring's, where he lived, for he said there was a lady and gentleman coming to look at some linens he had. She said, at first, she did not know whether I might or not, but she at last consented. He said he wanted me to go that night, so that I might be there very early in the morning; and that I might sleep with a servant girl in the house, if I would go. So I went with him to Mr. Ring's house, in Greenwich-street, almost by Mr. Rhinelander's brew-house. He told me to go up stairs to a room in the third story, and he would follow; it was about 9 o'clock: I heard the clock strike 8 some time before.

N^Y YORK,
July, 1800.

The People
v.
Croucher.

"I went up, and he followed, and took me through a dark entry into a room in the third story. He told me the servant girl would come and sleep with me, and then he locked the door, and took out the key, and went down. After a little time, he came back and locked the door inside: then he took and undressed me, and put me on the bed; and then he undressed himself, and came to bed to me. He used force," &c.

It appeared farther by the testimony, that the prisoner was married, or at least came to live with Mrs. Stockhaver, in two or three days after; and that they often quarrelled, and were in habits of discord; the prisoner at one time calling Margaret a whore in the presence of the mother, and accusing her of having lain with him by consent.

It was contended by Mr. Livingston, on the part of the prisoner, that if any connection had taken place between them, it was by consent. He observed, "if any thing improper had passed between them, I am inclined to

N'W YORK,
July 1800.

The People
v.
Croucher.

Query?

believe that it has been with her consent. The passions may be as warm in a girl of her age as in one of more advanced years, and with very little enticement she may have consented to become his mistress. If so, the law acquits him; for where consent is given after ten years of age, a rape cannot exist. But it is said her youth renders it impossible she should have been a lewd girl. Who is acquainted with the dissolute morals of our city, and does not know that females are to be found living in a state of open prostitution at the early ages of 12 and 13 years? I am not defending the conduct of the prisoner; I will suppose he is guilty of having most shamefully seduced and ruined the girl; but the moment common seduction is put upon the same footing, and confounded with rape, consequences the most dreadful are to be apprehended.

"The transaction took place in March, and we hear nothing of it in that month, nor until the middle of June. This delay is not satisfactorily accounted for. If you admit of the excuse now given, that this concealment was owing to dread of the prisoner, you put an excuse into the mouth of every witness who may choose to appear, and commence a similar prosecution from personal motives or revenge," &c.

Colden, Attorney General. It is admitted, that if the child is to be believed, that you must convict the prisoner. But the counsel say she is unworthy of credit, because no witnesses are brought to support her character. What does this require of us? That we should bring witnesses to prove that this infant was not lustful in her cradle. We have relied upon the natural pre-

sumption that a child of her age could not have any wanton desires. If there are extraordinary instances of so early a birth of the passions, and this child is one of them, why has not the prisoner brought forth witnesses to prove her so?

N^W YORK,
July, 1800.

The People
v.
Croucher.

But two months or more elapsed before she complained.

In answer to this objection, let it be first recollected, that during all this time she was living with the prisoner. Let his conduct to her be remembered: that he was forever beating her, turning her out of doors—driving her from her bed—always loading her with the most reproachful language. By such conduct he excited her fears to that degree, that, as the witness herself says, she could not cast her eyes upon him without feeling terrified.

It is said by the counsel, that a jury cannot be justifiable in pronouncing a verdict against the prisoner in such

*General Sessions, Sept. Term, 1823. Levi Washburn was indicted for an assault and battery, upon Mary-Ann Gilbert, (who was about fifteen years of age,) on the 11th of July, 1823. She swore that the defendant assaulted, and had a connection with her, in the suburbs of the city, against her consent.

It was contended, on the part of the defendant, that the story told by Mary-Ann was improbable, and that the connection was with her consent.

The court had great doubts whether the passions had arrived to that maturity to authorize a supposition of a connection, of that nature, with her consent; she being very small of her age, and had few marks of puberty.

The District Attorney pressed it in his argument to the jury; and the court observed to them, there was no definite time—it depended more upon the constitution and habits of body, than upon the age of the party.

The jury, however, returned a verdict in favour of the defendant.

N^W YORK, a case, unless the testimony of the party ravished is corroborated by other witnesses. Let us take this to be the law, and inquire how it applies to this case.
 Sept. 1800.
 The People
 v.
 Croucher.

When you know that the prisoner has boasted that he made this child a whore—when we have heard his confession that he has had her in his bed—when you know that he has told of the difficulty with which he obtained his infernal gratification, can you say that you have no corroborative testimony?

Benson, Justice. The prisoner at the bar stands indicted for the commission of a rape upon Margaret Miller. This crime, from the very nature of it, is apt to excite indignation in every breast; and when perpetrated on an infant of this age, that indignation becomes greater. It is, however, your duty to divest yourselves of all warmth and all prejudice, and to exercise your judgment upon this case in the most temperate manner. If it shall appear to you that the girl, young and unexperienced as she may be, yielded her consent, it is no rape, and you must pronounce the prisoner *not guilty*, however criminal in the eye of morality his conduct may be. The whole question will, I think, depend upon the credit which is to be given to her: if she is to be believed, there cannot be a doubt as to the prisoner's guilt. It is evident that there has been a connection between them, and the single question that remains is, whether it was against her consent. It is a circumstance that deserves your consideration, that a very long time elapsed after the commission of the fact, before she made any disclosure, and this, unless it can be satisfactorily accounted for, must undoubtedly detract much from her credibility. She attributed it to the terror which originally possessed her

mind, and which she says continued as long as he frequented the house of the person by whom she was adopted.

N^W YORK,
Sept. 1800.

The People
v.
Croucher.

The court cannot with propriety charge you, gentlemen, whether you ought, or ought not, to give credit to the principal witness: that is certainly your province.

If, upon the whole, you shall think her worthy of credibility, you must say the prisoner at the bar is guilty; if otherwise, you are bound to acquit him.

The jury immediately returned a verdict of *guilty*.

OYER AND TERMINER.

NEW YORK, SEPTEMBER, 1823.

<i>The People</i>	}	MURDER.
vs.		
<i>Jeremiah Ryan.</i>		

Present—Honourable *Ogden Edwards*, Circuit Judge.
Honourable *Richard Riker*, Recorder.
Aldermen *Zabriske, Mann, Taylor* and *Mead*.

Hugh Maxwell, District Attorney, for the People.
William M. Price and *David Graham*, for the Prisoner.

The prisoner was put to the bar for trial, on an indictment for the murder of David Findlay, on the 16th of October, 1822.

N^W YORK,
Sept. 1823.

The People
v.
Ryan.

The panel was called, and Mr. Nehemiah Merritt objected to being sworn on the jury. The ground of his objection was, that he belonged to the society called Quakers, the tenets of whose religion would not justify taking the life of any human being for any crime. On the authority of Palmer's case, (City-Hall Recorder, tit. *Challenge*,) he was unqualified to serve on the jury in a capital case.

John F. Sibell was called, who did not belong to the society of Friends, or Quakers, but who nevertheless had conscientious scruples against finding a verdict that would put in jeopardy the life of the prisoner.

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lenge.

He was challenged by the counsel for the people, for "that John F. Sibell does not stand indifferent between the people of the state of New York and Jeremiah Ryan, the prisoner at the bar, and assigns for special cause, in support of the challenge to the said juror, that he cannot conscientiously find a verdict for the people which in its consequences takes away life."

To this challenge the counsel for the prisoner demurred.

The court decided against the demurrer, and the juror was sworn and took his seat.

Maxwell, District Attorney, opened the case on the part of the people; he stated that the fact charged in the indictment would be proved principally by two witnesses; and that, unless the jury could discover some circumstances of mitigation, which reduced the grade of the offence,

they must pronounce it to be *murder*. He then proceeded to state the law upon this subject, and read authorities to show the distinction between murder, manslaughter, and excusable and justifiable homicide. All homicide was taken *prima facie* as malicious, and, therefore, murder, unless it was proved to be otherwise; and the burden of that proof rested on the accused. He pointed out the distinctions between malice express and implied, and showed from what circumstances malice might be inferred. The most material distinction established by these cases was the following:—If a man surprised another in the act of adultery with his wife, and killed him instantly on the spot, the law pronounced such killing to be manslaughter; but if the stranger was attempting a rape, and the wife cried out, and the husband entered and killed him, it was justifiable homicide *se defendendo*; nor could the consent of the wife, if in the presence of the husband, alter the offence from a rape; but if the adulterous act had been committed, and the husband, after time intervening sufficient for reflection, attacked and killed the adulterer out of revenge, the killing in such case is murder. Great as was the injury, the sufferer might not take revenge into his own hands. Vengeance belonged to God, and punishment to the law. The district attorney then proceeded to present the general outlines of the case, and concluded by presenting to the jury the turning point of the cause, which was, whether the prisoner killed the deceased while attempting to violate his wife; or whether, such violation having previously occurred, there had been a sufficient interval for his mind to become cool. In the former case, the act would be murder: in the latter, it would be manslaughter only.

N^W YORK,
Sept. 1823.

The People
v.
Ryan.

4 Blac. Com.
198. 1 Hale,
448. 3 Chit-
ty's C. L. 930.
1 Hale, 485,
486. Foster,
296.

N^W YORK,
Sept. 1823.

The People
v.
Ryan.

The witnesses for the prosecution were, David Gotrey, a man who lived in the same house with the prisoner ; Alexander Bryant, the watchman who apprehended him ; Marinus Willet, jun., the physician who examined the deceased.

The witnesses for the prisoner were, George and John Lovett, persons for whom the prisoner had worked, and one of them his landlord ; William Young, who lived in the same house with the deceased ; and Samuel I. Camp, another watchman.

The prisoner's examination before the police was also read.

The facts of the case, as elicited from the examination of these witnesses, appeared to be the following :

Ryan, the prisoner, was a laborer, living in Delancey-street, at the corner of Lewis-street, and occupying a front room on the ground floor. He had a wife of the worst character, and three children. He was of a remarkably mild and peaceable disposition, (so much so as to be called, by a witness, "*too soft*,") very industrious, honest, and sober, an indulgent husband, and a most affectionate parent. His wife was addicted to liquor, neglectful of her children, and too fond of the company of another man—the man who was killed. Ryan suspected her on this latter ground, and was very unhappy. They had frequently quarrelled, his wife being, when intoxicated, very noisy and turbulent, and often beating him. She had, however, promised to amend, and for a time abstained from visiting the deceased, to whose

room she had been in the habit of going almost daily for months together, while her husband was out at his work. Some time, however, before the fatal night, this criminal, or at least highly suspicious, intercourse had been renewed. If the prisoner's testimony at the police is to be relied on, the following distressing circumstances had taken place on the evening preceding the deed. Ryan had come home from his labor, and found his children (one but a year old) crying on the floor, their mother having gone out and left them. After making a little fire to cook their supper, suspecting where she was, he went to Finley's room, which was up stairs, and knocked at the door. He heard his wife's voice within, and the door was fast; after some delay the door was opened; he entered, and found two men there, but his wife was gone. He turned away; and while talking with the man below, saw his wife come down the stairs: she was a little intoxicated, and they went home together. At home she asked him for money; he refused it, lest she might spend it for liquor. She said she knew where she could get it, and, taking up her child, went out. He remained at home some time; but about 10 o'clock went again to Finley's, and, looking through the key-hole, saw his wife lying on the floor, with Finley's arms round her neck; her child lay beside her. He knocked for admittance: Finley opened the door, and he demanded his child. Finley dragged him into the room, attempted to be jocular, and insisted on his drinking, as a condition of delivering up the child. The wretched man complied, and, after much altercation, received his child and came away, his wife (much intoxicated) and Finley accompanying him.—[These facts rest on his sole testimony; those which follow are derived from the wit-

NEW YORK,
Sept. 1893.

The People
v.
Ryan.

N^W YORK,
Sept. 1823.

The People


v.
Ryan.

nesses.]—The whole party entered Ryan's house about 12 o'clock at night, on the 14th of October, 1822.

The men were not quarrelling, but the woman was so noisy that Gotrey, the man in the back room, who was then sitting up watching a sick daughter, went out to get the watch ; but not succeeding,*returned to his room, where he lay down on the bed, and fell asleep ; there was a light, but no noise, in Ryan's room. About one o'clock, as he thought, but in reality near three, he was roused by the voice of Ryan calling out; Mr. Gotrey ! Mr. Gotrey !—between each Mr. Gotrey, and cry, he heard heavy blows, apparently inflicted with a rattling instrument of metal on some soft substance. He got up, and ran up stairs to call his son-in-law, to come down and go with him into Ryan's room. Some time was spent in putting on part of his clothes, and when they together reached the bottom of the stairs, a watchman (Bryant) entered the front door, having Ryan in custody. The door of Ryan's room being open, a scene of petrifying horror presented itself : The candle, nearly burnt out, stood upon the table ; the wife, apparently asleep, her clothes on, and her child beside her, lay on a bed, which was upon a bedstead in the corner ; and upon another bed, in the middle of the floor, more than three feet from the bedstead, lay the body of Finley, horribly mangled, and in a gore of blood, but still alive. It lay on the right side, lengthwise of the bed, and in the middle of it, as one would have lain in a bed who was asleep in it—the head sunk down in a hollow, the upper or left side of the head beaten in ; the cheek bone shattered, the ear cut open, the whole head surrounded with a deep pool of blood, which was running in at the mouth—the mouth occasionally gaped ; the bones of the left hand broken

to pieces: the entire bed was afloat with blood, and blood was running in streams from the bed over almost the whole floor. His coat was off, and lay on the floor; his other clothes on: his shirt sleeves were red, and soaked with blood; and, according to one witness, his shoes were off. About six inches from his head lay an iron tongs, covered with blood, and having particles of flesh still adhering to it. On entering the room with the watchman and Gotrey, Ryan said, "*there he lies: I killed him, and I meant to kill him—and I'm willing to be hanged for it.*" The watchman, it appeared, had been passing near, and, hearing the blows, had stopped; hearing them continued, he went up on the stoop, and as he put his hand upon the handle of the front door, Ryan opened it from within, sprang past him, fell, recovered his feet, and ran swiftly up Delancey-street, toward Manhattan Island. The watchman pursued, overtook and seized him; on which he said, "*I killed him, and I meant to kill him; he has deprived me of my wife, and I have deprived him of his life. I am willing to suffer for it.*" On their way to the watch-house, he attempted to escape, but at the watch-house he again made the same confession. On his way to the police office, he made two attempts to escape, but finding the watchman too strong for him, offered him a bribe of ten dollars. No efforts were made to recover the wounded man; who, before morning, crawled from off the bed under a sort of sofa, in one corner of the room, and was found there by a witness, alone, on his hands and knees. Next day he was removed to his own house in a blanket, and thence on the sick hearse to the hospital, where, in the night, he died. He was a weakly man, of nearly sixty years old—had once been wealthy, and owned five ships, but was re-

N^Y YORK,
Sept. 1823.


The People
v.
Ryan.

N^W YORK,
Sept. 1823.

The People
v.
Ryan.

duced, and earned his bread by winding cotton balls. The man in the house with him thought that his misfortunes had in some degree injured his intellect. He lived in Broom-street.

Mr. Sampson opened the defence of the prisoner ; and his case was summed up by Messrs. Graham and Price, who were followed by Mr. Maxwell, for the prosecution. The reporter has not room to do justice to their abilities, by even a transcript of their arguments, which were very lengthy.

The court left it to the jury, under all the circumstances of the case, whether the crime charged upon the prisoner was murder or manslaughter, or justifiable homicide ; and observed, if the jury were of opinion that the prisoner committed the act while the deceased was in criminal intercourse with his wife, it would not be murder, nor even manslaughter, but would be justifiable homicide, *se defendendo*. Her consent would be of no avail to increase or extenuate the crime, if in the husband's presence. If, however, the jury should believe there was a criminal connection between the deceased and the wife of the prisoner, as there was no positive, although there was presumptive evidence of it, it would be for them to decide, from the circumstances, whether the homicide was committed after time for reflection had been given or not. The court recognized the rules laid down by the District Attorney in his opening to the jury.

The jury found the defendant guilty of *manslaughter*. And he was sentenced to the state prison fourteen years.

GENERAL SESSIONS,

NEW YORK, SEPTEMBER, 1823.

The People
vs.
George Frazier and
Bernard Courtney. } BURGLARY.

The prisoners were charged in an indictment with a burglary, committed in breaking open Mr. Carpenter's house, on the night of the 5th day of September, 1823, and carrying away four firkins of butter.

Burglary cannot be inferred by finding stolen property in possession of the accused, although larceny may.

The store was left secured in the usual manner at 10 o'clock, and was found broken open, and the property carried away, before sunrise the next morning. The parties were arrested the same day, and the property found upon them.

It was contended, by the counsel for the prisoners, that the proof only amounted to a grand larceny. The store might have been broken open after daylight, &c.; burglary could not be presumed.

Maxwell, contra.

The court decided, that burglary could not be inferred by finding stolen property in the possession of the accused, although larceny may.

The jury found the prisoners guilty of *grand larceny*.

CIRCUIT COURT U. S.

CHARLESTON, (S. C.) AUGUST, 1823.

Ex parte <i>Henry Elkison</i> , a subject of His Britan- nic Majesty, vs. <i>Francis G. Deliesseline</i> , Sheriff of Charleston District.	}	HABEAS CORPUS HOMINE REPLEGIANDO.
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This was a case of an arrest of a British seaman, under the 3d section of an act of the state of South Carolina, entitled "An act for the better regulation of Free Negroes and Persons of Color, and for other purposes," passed in December, 1822.

JOHNSON, Justice. The motion submitted by Mr. King, in behalf of the prisoner, is for the writ of *habeas corpus ad subjiciendum*; and if he should fail in this motion, then for the writ *de homine replegiando*; the one regarding the prisoner in a criminal, the other in a civil aspect: the first motion having for its object his discharge from confinement absolutely; the other his discharge on bail, with a view to try the question of the validity of the law under which he is held in confinement.

A document in nature of a return, under the hand and seal of the sheriff, has been laid on my table by the gentlemen who conduct the opposition, from which it appears, that the prisoner is in the sheriff's custody, under an act of this state, passed in December last; and, indeed,

the whole cause has been argued under the admission, that he is in confinement under the third section of that act, as he states in his petition.

CHARLE'N,
August, 1893.

Elkison

v.

Delieesseline.

The act is entitled, "an act for the better regulation of free negroes and persons of color, and for other purposes." And the third section is in these words: "that if any vessel shall come into any port or harbor of this state, from any other state, or foreign port, having on board any free negroes, or persons of color, as cooks, stewards, or mariners, or in any other employment on board of said vessel, such free negroes, or persons of color shall be liable to be seized, and confined in gaol, until such vessel shall clear out and depart from this state: and that when said vessel is ready to sail, the captain of said vessel shall be bound to carry away the said free negro, or free person of color, and to pay the expenses of his detention; and in case of his neglect or refusal so to do, he shall be liable to be indicted; and on conviction thereof, shall be fined in a sum not less than one thousand dollars, and imprisoned not less than two months; and such free negroes, or persons of color, shall be deemed and taken as absolute slaves, and sold in conformity to the provisions of the act passed on the 20th December, 1820, aforesaid."

As to the description or character of this individual, it is admitted, that he was taken by the sheriff, under this act, out of the ship *Homer*, a British ship trading from Liverpool to this place. From the shipping articles it appears that he was shipped in Liverpool; from the captain's affidavit, that he had known him several

CHARLE'N. years in Liverpool, as a British subject, and from his own
 August, 1823. affidavit, that he is a native subject of Great Britain, born
 Elkison in Jamaica.

v.
 Deliesseline.

In support of this demand on the protection of the United States, the British consul has also presented his claim of this individual, as a British subject, and with it the copy of a letter from Mr. Adams to Mr. Canning, of June 17th last, written in answer to a remonstrance of Mr. Canning, against this law. Mr. Adams' letter contains these words: "With reference to your letter of the 15th February last, and its enclosure, I have the honor of informing you, that immediately after its reception measures were taken by the government of the United States for effecting the removal of the cause of complaint set forth in it, which it is not doubted have been successful, and will prevent the recurrence of it in future."

This communication is considered by the consul as a pledge, which this court is supposed bound to redeem. It had its origin thus:

Certain seizures under this act were made in January last, some on board of American vessels, and others in British vessels; and among the latter, one very remarkable, for not having left a single man on board the vessel to guard her in the captain's absence.

Applications were immediately made to me in both classes of cases, for the protection of the United States' authority; in consequence of which I called upon the district attorney for his official services. Several reasons concurred to induce me to instruct him to bring the

subject before the state judiciary. I felt confident that the act had been passed hastily, and without due consideration; and knowing the unfavorable feeling that it was calculated to excite abroad, it was obviously best that relief should come from the quarter from which proceeded the act complained of. Whether I possessed the power or not to issue the writ of habeas corpus, it was unquestionable, that the state judges could give this summary relief, and I, therefore, instructed Mr. Gladsden to make application to the state authorities, and to do it in the manner most respectful to them. In the mean time I prevailed on the British consul, the late Mr. Moody, and the northern captains, to suppress their complaints, fully confident that when the subject came to be investigated they would be no more molested. The application was made to the state authority, and the men were relieved; but the ground of relief not being in its nature general or permanent, Mr. Moody made his representations to Mr. Canning; and the northern captains, I am informed, did the same to congress, or to the executive. What passed afterwards, came to my knowledge in such a mode, that, after what has publicly transpired on this argument, I do not think proper, as it certainly is not necessary, to declare it. A gentleman in this place (Col. Hunt) has declared, that he is authorized to deny that Mr. Adams was sanctioned by any thing that transpired between himself and any member of the state delegation, to give such a pledge. Certain, however, it is, that from that time the prosecutions under this act were discontinued, until lately revived by a voluntary association of gentlemen, who have organized themselves into a society to see the laws carried into effect. And here, as I well know the discussion that this occurrence will

CHARLE'N,
August, 1823.

Elkison
v.
Deliesseline.

CHARLE'N,
August, 1823.

Elkison

v.

Delesseline.

give rise to, I think it due to the state officers to remark, that from the time that they have understood that this law has been complained of on the ground of its unconstitutionality, and injurious effects upon our commerce and foreign relations, they have shown every disposition to let it sleep. On the present occasion, the attorney general has not appeared in its defence. The opposition to the discharge of the prisoner has been conducted by Mr. Holmes, the Solicitor of the Association, and by Col. Hunt. As there is nothing done clandestinely, or disavowed, there can be no offence given by a suggestion which means no more than to show that pressing the execution of the law, at this time is rather a private than a state act; and to furnish an explanation that may eventually prove necessary to excuse Mr. Adams to Mr. Canning, and, perhaps, to excuse some member of the state delegation to Mr. Adams.

Certain it is, that I cannot officially take notice of Mr. Adams' letter. However sufficient for Mr. Canning to rely on, it is not legally sufficient to regulate my conduct, or vest in me any judicial powers. The facts which I have communicated will, I hope, be sufficient to show that our administration has acted in good faith with that of Great Britain.

Two questions have now been made in argument; the first on the law of the case, the second on the remedy.

On the unconstitutionality of the law under which this man is confined, it is not too much to say, that it will not bear argument; and I feel myself sanctioned in using this strong language, from considering the course of rea-

soning by which it has been defended. Neither of the gentlemen has attempted to prove that the power therein assumed by the state, can be exercised without clashing with the general powers of the United States to regulate commerce; but they have both strenuously contended, that *ex necessitate* it was a power which the state must and would exercise, and, indeed, Mr. Holmes concluded his argument with the declaration, that, if a dissolution of the union must be the alternative, he was ready to meet it. Nor did the argument of Col. Hunt deviate at all from the same course. Giving it in the language of his own summary, it was this: South Carolina was a sovereign state when she adopted the constitution—a sovereign state cannot surrender a right of vital importance—South Carolina, therefore, either did not surrender this right, or still possesses the power to resume it—and whether it is necessary, or when it is necessary, to resume it, *she is herself the sovereign judge.*

CHARLE'N,
August, 1833.

Elkison
v.
Delicessaline.

But it was not necessary to give this candid expose of the grounds which this law assumes; for it is a subject of positive proof, that it is altogether irreconcilable with the powers of the general government; that it necessarily compromises the public peace, and tends to embroil us with, if not separate us from, our sister states; in short, that it leads to a dissolution of the Union, and implies a direct attack upon the sovereignty of the United States.

Let it be observed that the law is, "if any vessel," (not even the vessels of the United States excepted,) "shall come into any port or harbor of this state," &c., bringing in free colored persons, such persons are to

CHARLE'N, become "*absolute slaves*," and that, without even a form of trial, as I understand the act, *they are to be sold*. By the next clause, the sheriff is vested with *absolute power*, and expressly enjoined to carry the law into effect, and is to receive the one half of the proceeds of the sale.

August, 1823.

 Elkison
 v.
 Deliesseline.

The object of this law, and it has been so acknowledged in argument, is to prohibit ships coming into this port employing colored seamen, whether citizens or subjects of their own government or not. But if this state can prohibit Great Britain from employing her colored subjects, (and she has them of all colors on the globe,) or if at liberty to prohibit the employment of her subjects of the African race, why not prohibit her from using those of Irish or of Scottish nativity? If the color of his skin is to preclude the Lascar or the Sierra Leone seaman, why not the color of his eye or his hair exclude from our ports the inhabitants of her other territories? In fact it amounts to the assertion of the power to exclude the seamen of the territories of Great Britain, or any other nation, altogether. With regard to various friendly nations it amounts to an actual exclusion in its present form. Why may not the shipping of Morocco or of Algiers cover the commerce of France with this country, even at the present crisis? Their seamen are all colored, and even the state of Massachusetts might lately, and may perhaps now, expedite to this port a vessel with her officers black, and her crew composed of Nantucket Indians, known to be among the best seamen in our service.—These might all become slaves under this act.

If this law were enforced upon such vessels, retalia-

tion would follow ; and the commerce of this city, feeble and sickly, comparatively, as it already is, might be fatally injured. Charleston seamen, Charleston owners, Charleston vessels, might, *eo nomine*, be excluded from their commerce, or the United States involved in war and confusion. I am far from thinking that this power would ever be wantonly exercised, but these considerations show its utter incompatibility with the power delegated to congress to regulate commerce with foreign nations and our sister states.

CHARLE'N,
August, 1823.

Elkison
v.
DeLiesseline.

Apply the law to the particular case before us, and the incongruity will be glaring. The offence, it will be observed, for which this individual is supposed to forfeit his freedom, is that of coming into this port in the ship *Homer*, in the capacity of a seaman. I say this is the whole of his offence ; for I will not admit the supposition that he is to be burdened with the offence of the captain in not carrying him out of the state. He is himself shut up, he cannot go off ; his removal depends upon another. It is true the sale of him is suspended upon the conviction of the captain, and the captain has the power to rescue him from slavery. But suppose the captain, as is very frequently the case, may find it his interest or his pleasure to get rid of him, and of the wages due him, his fate is suspended on the captain's caprice in this particular ; but it is the exercise of a dispensing power in the captain, and nothing more. The seaman's crime is complete, and the forfeiture incurred, by the single act of coming into port ; and this even though driven into port by stress of weather, or forced by a power which he cannot control, into a port for which he did not ship himself: the law contains no exception to meet such contingencies.

CHARLE'N,
August, 1823.

Elkison
v.
Deliesseleine.

The seaman's offence, therefore, is coming into the state, in a ship or vessel ; that of the captain consists in bringing him in, and not taking him out of the state, and paying all expenses. Now, according to the laws and treaties of the United States, it was both lawful for this seaman to come into this port, in this vessel, and for the captain to bring him in the capacity of a seaman ; and yet these are the very acts for which the state law imposes these heavy penalties. Is there no clashing in this ? It is in effect a repeal of the laws of the United States, *pro tanto*, converting a right into a crime.

And here it is proper to notice that part of the argument against the motion, in which it was insisted on, that this law was passed by the state in exercise of a concurrent right. Concurrent does not mean paramount, and yet, in order to devert a right conferred by the general government, it is very clear that the state right must be more than concurrent.

But the right of the general government to regulate commerce with the sister states, and foreign nations, is a paramount and exclusive right ; and this conclusion we arrive at, whether we examine it with reference to the words of the constitution, or the nature of the grant. That this has been the received and universal construction from the first day of the organization of the general government, is unquestionable ; and the right admits not of a question any more than the fact. In the constitution of the United States—the most wonderful instrument ever drawn by the hand of man—there is a comprehension and precision that is unparalleled ; and I can truly say,

that, after spending my life in studying it, I still daily find in it some new excellence.

CHARLEN,
August, 1823.

Elkison

v.
Delicesseline.

It is true, that it contains no prohibition on the states to regulate foreign commerce. Nor was such a prohibition necessary; for the words of the grant sweep away the whole subject, and leave nothing for the states to act upon. Wherever this is the case, there is no prohibitory clause interposed in the constitution. Thus, the states are not prohibited from regulating the value of foreign coins, or fixing a standard of weights and measures, for the very words imply a total, unlimited grant. The words in the present case are, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." If congress can regulate commerce, what commerce can it not regulate? And the navigation of ships has always been held, by all nations, to appertain to commercial regulations.

But the case does not rest here. In order to sustain this law, the state must also possess a power paramount to the treaty-making power of the United States, expressly declared to be a part of the supreme legislative power of the land; for, the seizure of this man, on board a British ship, is an express violation of the commercial convention with Great Britain, of 1815. Our commerce with that nation does not depend upon the mere negative sanction of not being prohibited. A reciprocal liberty of commerce is expressly stipulated for, and conceded, by that treaty: to this the right of navigating their ships in their own way, and particularly by their own subjects, is necessarily incident. If policy requires any restriction of this right, with regard to a particular class of subjects

CHARLE'N. of either contracting party, it must be introduced by treaty.
 August, 1823. The opposite party cannot introduce it by a legislative act
 of his own. Such a law as this could not be passed even
 by the general government, without furnishing a just
 cause of war.

Elkison
 v.
 Deliesseline.

But to all this, the plea of necessity is urged ; and of the existence of that necessity we are told the state alone is to judge. Where is this to land us ? Is it not asserting the right in each state to throw off the federal constitution at its will and pleasure ? If it can be done as to any particular article, it may be done as to all : and, like the old confederation, the union becomes a mere rope of sand. But I deny that the state surrendered a single power necessary to its security, against this species of property. What is to prevent their being confined to their ships, if it is dangerous for them to go abroad ? This power may be lawfully exercised. To land their cargoes, take in others, and depart, is all that is necessary to ordinary commerce, and is all that is properly stipulated for in the convention of 1815, so far as relates to seamen. If our fears extend also to the British merchant, the supercargo, or master, being persons of color, I acknowledge that, as to them, the treaty precludes us from abridging their rights to free ingress and egress, and occupying houses and warehouses for the purposes of commerce. As to them, this law is an express infraction of the treaty. No such law can be passed consistently with the treaty, and, unless sanctioned by diplomatic arrangement, the passing of such a law is tantamount to a declaration of war.

But if the policy of this law was to keep foreign free

persons of color from holding communion with our slaves, it certainly pursues a course altogether inconsistent with its object. One gentleman likened the importation of such persons to that of clothes infected with the plague, or of wild beasts from Africa; the other to that of fire-brands set to our own houses only to escape by the light. But surely if the penalty inflicted for coming here is in its effect that of being domesticated, by being sold here, then *we* ourselves inoculate our community with the plague, *we* ourselves turn loose the wild beast in our streets, and *we* put the fire-brand under our own houses. If there are evil persons abroad who would steal to this place in order to do us this mischief, (and the whole provisions of this act are founded in that supposition,) then this method of disposing of offenders by detaining them here, presents the finest facilities in the world for introducing themselves lawfully into the very situation in which they would enjoy the best opportunities of pursuing their designs.

CHARLE'N,
August, 1823.

Elkison
v.
DeLiesseline.

Now, if this plea of necessity could avail at all against the constitution and laws of the United States, certainly that law cannot be pronounced necessary which may defeat its own ends; much less when other provisions of unexceptionable legality might be resorted to, which would operate solely to the end proposed, viz., the effectual exclusion of dangerous characters. On the fact of the necessity for all this exhibition of legislation and zeal, I say nothing: I neither admit nor deny it. In common with every other citizen, I am entitled to my own opinion; but when I express it, it shall be done in my private capacity.

CHARLE'N,
August, 1823.

Elkison

v.
Delicasseline.

But what shall we say to the provisions of this act as they operate on our vessels of war? Send your sheriff on board one of them, and would the spirited young men of the navy submit to have a man taken? It would be a repetition of the affair of the Chesapeake. The public mind would revolt at the idea of such an attempt: and yet it is perfectly clear that there is nothing in this act which admits of any exception in their favor.

Upon the whole, I am decidedly of the opinion, that the third section of the state act now under consideration, is unconstitutional and void, and that every arrest made under it subjects the parties making it to an action of trespass.

Whether I possess the power to administer a more speedy and efficacious remedy, comes next to be considered.

That a party should have a right to his liberty, and no remedy to obtain it, is an obvious mockery; but it is still greater to suppose that he can be altogether precluded from his constitutional remedy to recover his freedom.

I am firmly persuaded, that the legislature of South Carolina must have been surprised into the the passing of this act. Either I misapprehend its purport, or it is studiously calculated to hurry through its own execution, so as to leave the objects of it remediless. By giving it the form of a state prosecution, the prisoner is to be deprived of the summary interference of the United States' authority; and by passing it through the sheriff's

hands, without the intervention of any court of justice, he is to be deprived of the benefit of the 25th section of the judiciary act, by which an appeal might be had to the supreme court. Thus circumstanced, it is impossible to conceal the hardships of his case, or deny his claim to some remedy.

CHARLE'N,
August, 1893.

Elkison
v.
Delicesseline.

The opposition to issuing the writ of habeas corpus is founded altogether on the ground that he is in custody under state authority; and the proviso to the 14th section of the judiciary act of 1789 is relied on. That proviso is in these words: "Provided that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into some court to testify."

Mr. King admits, that this proviso is fatal to his motion, unless his case be taken out of it, by one or both of the following considerations:

1st. That so far as it abridges the right of *habeas corpus*, it is inconsistent with that provision of the constitution which declares, that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it;"—a state of facts which cannot possibly be predicated of the present: or,

2d. That the prisoner cannot be said to be in confinement under state authority, if the state law be void under which he is arrested. And being by his national char-

CHARLE'N,
August, 1823.

Elkison
v.
Delesseline.

acter entitled to the protection of this court, in other words, a constitutional suitor of the United States' courts, this, which is the only adequate remedy, should be extended to him.

These views of the subject certainly merit much consideration. Arguments in favor of this cherished right are not lightly to be passed over. But what are the *courts* of the United States to do? We cannot undertake to judge when that crisis has arrived which the constitution contemplates; nor are we to undertake to define and limit the meaning of those words, *the privilege of the writ of habeas corpus*. Every state in the union may have had different provisions limiting and defining the extent of this privilege; some, perhaps, confining themselves to the privilege as it stood at common law; others, adopting some or all of those statute provisions which have wrought such a change in its practical utility. It can, then, only be left to congress to give an uniform and national operation to this provision of the constitution. In legislating on this subject they have confined us to those cases in which the party is confined under United States' authority, or is necessary to be introduced into its courts as witnesses.

On the second point it is to be observed, that the proviso to the fourteenth section of the judiciary act imposes on the petitioner the necessity of maintaining the affirmative of his being *confined under United States' authority*; so that it is not enough to negative his being in custody under state authority, for the consequence is only that he is confined arbitrarily, and without authority, by a state officer; a case to which our power to issue this

writ does not extend. As far as congress can extend, and shall extend, the power to afford relief by this writ, I trust I shall never be found backward to grant it. At present I am satisfied that I am not vested with that power in this case.

CHARLE'N,
August, 1823.

Elkison
v.
Deliesseline.

We come next to consider the motion for the writ *de homine replegiando*.

And here the question appears to me to be "what right I have to refuse it?" As well might I interpose to prevent the petitioner from suing out his writ for trespass and false imprisonment, or the captain his writ for trespass in taking the seaman from his vessel, or the ordinary writ of replevin on distress for rent, as to refuse this writ *de homine replegiando*. If it is not the proper writ for his case, he must take the consequence; but this is not the time and mode to try that question. It is a writ of common right, and contains upon the face of it its own death-warrant if it be not legally grantable in any particular case. If the return of the party to whom it issues, shows that it is not a case proper for the remedy intended to be given, there it ends. If the return be false, it may be contested; if true, and it presents a proper case, then another writ issues, which brings in question the right of personal freedom. The whole of this is set forth in the *registrum brevium*, and in Fitzherbert, which is nearly copied from it.

If my opinion extrajudicially be asked, I would express the most serious doubt whether this writ could avail the party as against the sheriff; but as against his vendee,

CHARLE'N, there is not a question that it will well lie at common law.
August, 1823.

Elkison
v.
Deliesseline.

But gentlemen contend, that this writ is obsolete ; that " it is not to be raked up from the ashes of the common law, to be now first used against the state of South Carolina ;" that it cannot issue when the *habeas corpus* cannot issue ; and finally, that the writ of ravishment of ward is the only writ established by a law of the state as the proper writ to try the question of freedom of a person of color, and no other can be substituted without changing the law respecting slaves.

There is not one of these arguments that can be sustained either in law or fact. The writ *de homine replegiando* is ingrafted by law into the jurisprudence of South Carolina ; nor is it unknown in actual practice, in cases to which it is applicable. In the State of New York, it is familiarly used. It is true, that the writ of ravishment of ward is expressly given by a state law ; but it is given in favor of those who are by law declared to be *prima facie* held to be slaves. It curtails no right of a freeman, previously existing ; and only operates to give an action to one whose condition or situation places him in absolute duress, or to any other who shall charitably volunteer in his behalf as guardian. But the act under consideration furnishes itself the distinction between ordinary cases and the present. This act operates only as to free-men—free persons of color, and not as to slaves, so that a whole crew of slaves entering this port would be free from its provisions. It is an indispensable attribute of the individual affected by it, that he should be free. If he is not, the sheriff is not authorized by it to touch him :

and, although forbid by other laws to remain here, his coming here does not expose him to seizure and imprisonment under the provision of this law, whether it be constitutional or not. The negro act of '47 supposes him a slave: the present act supposes him a freeman. Several other answers might be given to the argument; but this one is sufficient. We do not pretend to a right to encroach on the power of the state over its slave population. The power remains unimpaired. But under a state law, this man is recognized as a freeman, and in that view, if in no other, we are fully authorized to treat him as such.

CHARLE'N,
August, 1823.

Elkison
v.
Delicasseline.

As to the argument that this writ cannot issue, where the writ of *habeas corpus* cannot issue, it was fully answered by the petitioner's counsel. If the argument proves any thing, it leads to the contrary conclusion.

Upon the whole, I am led to the conclusion,

That the third clause of the act under consideration is clearly unconstitutional, and void; and the party petitioner, as well as the ship-master, is entitled to actions as in ordinary cases:

That I possess no power to issue the writ of *habeas corpus*; but for that remedy he must have recourse to the state authorities:

That as to the writ *de homine replegiando*, I have no right to refuse it; but, although it will unquestionably lie

CHARLE'N, to a vendee under the sheriff, I doubt whether it can avail
 August, 1823. the party against the sheriff himself. The counsel will
 Elkison then consider whether he will sue it out.
 v.
 Delieesseline,

GENERAL SESSIONS.

NEW YORK, SEPTEMBER, 1823.

The People }
 vs. } MISDEMEANOR.
Luke Marley. }

Maxwell, District Attorney, for the Prosecution.

D. Graham and Anthon, for the Defendant.

Construction
 of the act "for
 the more ef-
 fectual pre-
 vention of
 fires in the
 city of New
 York," passed
 9th of April,
 1823.

The defendant was indicted for erecting a building
 against the act entitled "an act for the more effectual pre-
 vention of fires in the city of New York," passed the 9th
 of April, 1823.

The building was erected in Elm street.

The line, or fire limits, begins on the East River, and
 passes through Montgomery street and Canal street, to the
 Hudson River. The line runs through Elm street, and
 includes the west side.

It appeared by the testimony of a number of witnesses,
 that the defendant erected a wooden building at the
 corner of Elm and Pearl streets. The building was

29 feet by 22, and two stories high. It had been erected by raising a shed of the same dimensions, which had been built a great number of years, about 6 feet, and enclosing and covering it with a roof.

N^W YORK,
Sept. 1823.

The People
v.
Marley.

It appeared by the testimony, that new sills were added ; that it covered the same space of ground when raised that it did before ; that the roof was only repaired : that it was raised 6 feet, or at most 7 feet ; that before it was only a shed, but that now it was a comfortable *work-shop* ; that its danger was much increased by the addition of a greater quantity of combustible materials, and on account of its height. The question was, whether this was erecting a building within the act.

RIKER, Recorder. The evidence is clear, that this building is within the fire limits, as defined by the act. The sole question for the jury to decide is, whether the erection of this building falls within the prohibition intended by the statute. The indictment is framed under the act "for the more effectual prevention of fires," passed 1801, re-enacted in 1813, extended in 1815, and again extended the 9th of April, 1823.

At common law a building of wood might have been erected, and was often erected in cities and towns, until the frequent caution given to the legislature of their dangerous tendency, by numerous fires and conflagrations, that not only destroyed the houses and the property in them, but many valuable lives : to prevent which, the parliament of Great Britain passed several prohibitory statutes. (1 Black. Com. 87.) And by the

N^W YORK,
Sept. 1823.

The People
v.
Marley.

legislature in this state by the several statutes before mentioned.

The legislature meant to guard the city against fires. That is the mischief they *intended* to prevent; and it is the duty of the court so to construe the acts of the assembly, as that *intent* may be carried into effect. With this view of the case, we are of opinion, that *any material alteration in the building, any considerable augmentation of it, so as to enlarge its dimensions laterally, or on its sides, is within the meaning, and, therefore, within the act.* If raised a story, as in the case now before the court, it must be done by the addition of combustible materials: the danger is, therefore, increased; and in the second place, the building is higher than it was before, and, if on fire, not so easily extinguished. We are of opinion, that it is within the act, as it is clearly within the mischief the legislature meant to prevent.

The jury found the defendant *guilty*.

GENERAL SESSIONS.

NEW YORK, OCTOBER, 1823.

<i>The People</i>	}	MISDEMEANOR.
vs.		
<i>P. F. I. Gautier.</i>		

Maxwell, District Attorney, Counsel for the People.*Price*, Counsel for the Prisoner.

Mr. Gautier was indicted under the act of the Assembly of the state of New York, passed the 15th day of April, 1817, entitled "an act to regulate sales by public auction," for selling goods at public auction, not having been appointed in pursuance of that or any other act of the assembly of this state. The words of the second section of the act are, "that the person administering the government of this state, by and with the advice and consent of the council of appointment, shall annually appoint so many persons, within this state, to be auctioneers, as they shall judge proper." The third section declares, "that if any person or persons, not appointed and authorized in the manner by this act directed, nor by or under the authority of the United States, shall sell, or attempt to sell any goods, wares, merchandize, or effects, whatever, by way of public auction or vendue, within this state, he shall be considered guilty of a misdemeanor, and shall, on conviction, be fined a sum not exceeding five hundred dollars, or imprisoned for a term not exceeding three months," &c.

N^W YORK,
Oct. 1823.



The People

v.

Gautier.

Price, counsel for the defendant, contended, that there could be no conviction under this statute, inasmuch as the constitution had abrogated it by changing the manner of appointment. An auctioneer could not now be appointed "by and with the advice and consent of the council of appointment, such a power not being in existence, having been abrogated by the constitution, and by "an act directing the mode of appointing certain officers," which defined the manner of appointing auctioneers, to wit, "that the person administering the government of this state shall nominate, and with the consent of the senate, appoint." It was entirely silent as to any penalties for selling goods at public auction, without such appointment. It was a *casus omissus*, not provided for by any law in the state. Every man who chose might sell at public auction without being amenable to the penalties of the act of the 15th of April, 1817, or any other act. It would be the duty of the legislature to pass an act upon this subject; but until that was done, there was no remedy.

The court was of the same opinion; and decided that the act of 1817 was inoperative, and abrogated by the new constitution; and the act of 1823 was silent as to any penalties for selling goods at public auction, and instructed the jury to acquit the defendant.

The jury returned a verdict of *not guilty*.

OYER AND TERMINER.

PHILADELPHIA, MAY, 1816.

<i>The Commonwealth</i>	}	MURDER.
vs.		
<i>Richard Smith.</i>		

Jared Ingersoll and *Edward Ingersoll, Esquires*, Counsel for the Commonwealth.

William Rawle, Peter A. Browne, and J. B. Smith, Esquires, Counsel for the Prisoner.

The facts of the case, and the law arising from them, are embraced in the charge of the president.

RUSH, Justice. I request your attention to what I am about to say to you, and I also request that you would consider this charge as proceeding from the whole court.

The prisoner at the bar, Richard Smith, is indicted for the murder of John Carson, by shooting him through the head, on the 20th January last.

There is not the least doubt he died of the wound, after languishing till the 4th of February.

It is your duty to decide, by your verdict, taking into consideration all the circumstances of the case, whether he be guilty of murder or not.

PHILAD'A,
May, 1816.

The Com'th
v.
Smith.

A jury has a right in criminal cases to give a special or a general verdict. A special verdict states all the material facts, and submits to the court the question of law arising on these facts. This is not usual, and is not expected by this court.

A general verdict is where the jury, in general terms, say the prisoner is guilty or not guilty.

From the right which the jury has, to give a general verdict in all criminal cases, it follows they have incidentally a right to determine both the law and the facts, which are often almost inseparably connected with each other.

What says the constitution upon this point?

In indictments for libels, the jury shall have a right to determine the law and the facts under the direction of the court, as in other cases.

From the evidence it appears that John Carson, the deceased, was married to Ann Baker, in June, 1801, and that she was afterwards married in the month of October, 1815, to Richard Smith, the prisoner in the bar.

It is made a question whose wife she was on the 20th of last January, the day on which Carson fell by the hands of Smith.

It is provided by our divorce law, where a man leaves his family for two years, and his wife marries after that time, in consequence of a report, apparently well ground-

ed, that her husband is dead, that in such case she is not guilty of adultery; and that the husband, on his return, may insist on having his wife back again, or to be divorced from her; and that he may institute a suit for a divorce within six months after his return.

PHILAD'A,
May, 1816.

The Com'th
v.
Smith.

To make the marriage of a wife lawful, in any degree, under this act, two things are expressly required by the very words of it.

1st. That the husband has been two years absent.

2d. That a rumor existed of the death of the husband. The marriage must be founded in both circumstances to give it validity.

What is the evidence in this case? There is no doubt that Capt. Carson had been absent two years at the time his wife was married to the prisoner; but the other circumstance, viz., the report or rumor of the death of Capt. Carson, has not been made out in proof. To justify the second marriage of Mrs. Carson, there should be evidence of a rumor of this description. What is the meaning of the expression "a rumor of the death of a man *in appearance* well founded"? We think it means general report that a man died at a particular town or place, was shipwrecked, or lost his life in some way, which the report specifies. It appears to the court that the expression, "in appearance well founded," has reference to the place and manner of his death. No such evidence has been given. Jane Baker only says, "there was a rumor of Carson's death; a sailor said so." This loose evidence is not the evidence the law requires to

PHILAD'A,
May, 1816.


The Com'th
v.
Smith.

justify a wife's marrying in the absence of her husband. There must be a general report of his death, and of the place and manner of it.

There not being the evidence required by law, to authorize the marriage of Ann Carson with the prisoner in the bar, it is clearly the opinion of the court that it was, to all intents and purposes, null and void. This being the case, it follows that she was guilty of adultery with Smith; that the rights of Smith, as a third person, have no legal foundation or existence; that Carson had an undoubted right to proceed at law against his wife for a divorce, and to settle with her, and withdraw the suit, whenever he thought proper, without the consent of the prisoner, or any other person. The law now under consideration supposes a case of this very kind, by enacting, that in any suit for a divorce on the ground of adultery, if the defendant shall prove that the plaintiff admitted the defendant into conjugal embraces after he knew she had been guilty of adultery, it shall operate as a perpetual bar to his obtaining a divorce.

We go farther, and state to you upon that point, that Ann Carson could not have two husbands at the same time. She could not be at the same time the wife of John Carson and the prisoner.

She was unquestionably once the wife of John Carson, and nothing but death or divorce could dissolve the connection. These are the only two modes known to the law of terminating the marriage contract.

It is stated by the defendant's counsel, that a subpoena

for the purpose of a divorce, is so decisive of the intent of the party, that he cannot alter or change his intention. This is strange language, and is equivalent to saying, the bringing a suit for divorce, and the decree in the case, are equally binding on the party. Where would be the use of the decree, if the subpoena was conclusive in the libellant? We are, therefore, clearly of opinion, that on the 10th of January last Ann Carson was the wife of John Carson, and that he had a right to settle his differences with his wife, and to receive her again into his arms.

PHILAD'A,
May, 1816.

The Com'th
v.
Smith.

It being universally understood and known that the property of the wife is the property of the husband, and that he alone has the control over it; the consequence is that John Carson had an undoubted right to take possession of the house and goods which belonged to his wife, on his return in January last to this city, and to his family. It follows, that Richard Smith, the prisoner, was an intruder, and had acquired unlawful possession of the wife, of the house, and of the goods and chattels of John Carson.

This point being settled, we proceed to remark, that the crime of murder essentially consists in taking away the life of a fellow-creature, with circumstances that show a vindictive temper and malignity of heart.

It is not the design of the court to distract your minds, or fatigue your attention, by a tedious discussion on the law of murder. We shall endeavor to make you understand so much of this subject, that you may be able to form a correct judgment on the question submitted to

PHILAD'A,
May, 1816.

The Com'th
v.
Smith.

you. It will be proper to state a few leading principles that have received the sanction of the highest judicial authority in this state, subsequent to the passing the law of 1794.

In the case of the Commonwealth v. Mulatto Bob, tried at Easton in 1795, before Chief Justice M'Kean and Judge Smith, it was decided by the court, that, since passing the law of 1794, the intention still remains the criterion of the crime; that the intention of the prisoner is to be collected from his words and actions; and that on the supposition a man, without uttering a word, should strike another on the head with an axe, it would be deemed premeditated violence.

In the case of The Commonwealth v. O'Hara, tried before Chief Justice M'Kean and Judges Shippen and Smith, in Philadelphia, in the year 1797, the court held, if the murder be committed with an instrument likely to kill, it is wilful; and that to make it deliberate and premeditated, the party must have time to reflect and to frame the design, however short the time may be, and must intend to kill.

If the defendant has time to think, and did intend to kill, for a minute, as well as an hour or a day, it is a deliberate, wilful and premeditated killing, constituting murder in the first degree, within the act of assembly.

We shall presently examine the conduct of the prisoner, and compare it with the principles laid down in these cases.

In the mean time, we observe to you, gentlemen, that

the principles just stated are from the highest judicial authority in Pennsylvania, and that it is the duty of this court, and of you as jurymen, to submit to them.

PHILAD'A,
May, 1816.

The Com'th
v.
Smith.

For a moment, however, gentlemen, let us inquire into their correctness.

The *wilful, deliberate* and *premeditated* killing a person is, by the law of 1794, described to be murder in the first degree.

What is it to kill a person wilfully? It is the same thing as killing him on purpose. He who does an act wilfully, does it on purpose, and he who does an act on purpose, does it wilfully.

The next ingredient to make the killing murder in the first degree is, it must be deliberate. But does the law fix the time of such deliberation? No such thing, gentlemen. Does it say, the prisoner must ponder over the crime for years, for months, for weeks, or days, or hours, or for any other given time? What sort of a law would it be, if such construction were put upon it by courts and juries?

Suppose, for example, it should be contended, that it must appear the party had pondered on the commission of the crime one hour or five minutes before the fact.

I ask, then, why fix an hour or five minutes for deliberation? Why not half an hour? why not two hours? why not two minutes?

PHILAD'A,
May, 1816.

The Com'th
v.
Smith.

The truth is, in the nature of the thing, no time is fixed by the law, or can be fixed, for the deliberation required to constitute the crime of murder.

To deliberate is to reflect, with a view to make a choice; and if it appeared that the party did reflect, though but for a minute, before he acted, it is unquestionably a sufficient deliberation within the meaning of the act of assembly.

The last requisite to constitute murder in the first degree is, that the killing must be premeditated.

To premeditate is to think of a matter before hand; it is to conceive of a thing before it is executed. The word premeditated would seem to imply something more than deliberate, and may mean that the party had not only deliberated, but had framed in his mind the plan of destruction.

We therefore say to you, gentlemen, and we say it confidently, that it is equally true, both in fact and from experience, that no time is too short for a wicked man to frame in his mind a scheme of murder, and to contrive the means of accomplishing it.

Gentlemen, it is well known that certain acts will so far justify a man, that his killing another will not be murder. There are also other acts that are not a sufficient provocation to justify killing a person.

For example, the demand of a debt is not a provoca-

tion to justify killing. It is, therefore, murder to kill a man in the act of asking the payment of a debt.

PHILAD'A,
May, 1816.

The Com'th
v.
Smith.

Further, gentlemen. It is a principle of law, that no breach of a man's word or promise—no trespass either to lands or goods—no affront, by word or gesture, will excuse a person from the crime of murder, if he becomes so far transported as to kill the person who then offends him.

Apply this to the facts before you. Suppose, then, the house was in fact Smith's, and that Carson, in going there on Saturday to demand the possession of his family, was a trespasser: it is the opinion of the court, that Smith's killing him, under these circumstances, in the very act of making such peaceable demand, is, in every principle of law, murder in the first degree.

To recapitulate all the testimony that has been laid before you, would be an endless task, and I add, a useless task; because, on this trial, as on all others, a great deal of evidence has been given that has no more bearing on the merits of the case, than one of *Æsop's Fables*, or a chapter from *Don Quixote*. Evidence of this description it is not our practice to take down in writing.

The material facts in this cause seem to be these: On the 20th of January last, at about 11 o'clock at night, the prisoner in the bar shot John Carson through the head, of which wound he died on the 4th of the next month. That on Wednesday, the 17th of January, the prisoner and the deceased dined together at the house

PHILAD'A,
May, 1816.

The Com'th
v.
Smith,

of John Carson, the corner of Second and Dock streets. On this occasion John Carson got into a rage at seeing the prisoner assume the direction of his children and his servants, and, seizing a knife, made an attempt to strike him; the prisoner laid hold of his arm, on which the deceased, with the other arm, took up another knife. Mrs. Carson attempted to hold her husband; but, breaking loose, he ran down stairs, with two knives in his hands, in pursuit of Smith, who had gone off without his hat. Upon Mrs. Carson telling her husband if he wanted to commit murder, to murder her, he exclaimed, Murder! Yes! The evening of this very day, the prisoner was seen in the kitchen with a pair of pistols, one of which was loaded: that he then declared, "that if Carson entered the door, to lay hands on him, he would certainly shoot him." In consequence of this violence of John Carson, he was, on the application of the prisoner, bound over the next day to keep the peace.

The next interview between the prisoner and the deceased was on Saturday evening, which terminated the mortal career of John Carson, in the manner you have heard.

On this fatal evening, Carson came to his house between 7 and 8 o'clock, when Mrs. Carson and Smith both left it. Carson then sent for Thomas Baker and Jane Baker, the parents of Mrs. Carson, who, about 10 o'clock, went to the house. On coming there, they found Carson in the china store: he and they went up stairs into the parlor. Between 10 and 11 that evening, Thomas Abbot went home, and being informed that Mr. and Mrs. Baker, who lived under his roof, had gone to

Mrs. Carson's, he determined to follow them there. When he got near the house, he saw Mrs. Carson, and went with her into the office of Jonathan B. Smith, in the neighbourhood of Carson's house. The prisoner came in soon after, and asked Jonathan Smith to give him *the* pistol, which was refused. Mrs. Carson then said, let us go—you know where there is one. The prisoner swore, *if Carson attempted to touch him he would kill him*. The prisoner, Mrs. Carson, and Thomas Abbot, left the office of J. B. Smith together, and on coming to the house of Carson, Abbot staid below, and Mrs. Carson and the prisoner went up stairs. In about a minute, Abbot following them up stairs, passed the prisoner standing in the entry, with his right hand upon his breast, under his surtout coat, and his left hand also on his breast; he went into the parlour, where he found Capt. Carson, Mrs. Carson, Thomas Baker, and Jane Baker. Abbot had not been in the room more than half a minute, when the prisoner came in, and stood near the door, in the same attitude in which he appeared in the entry; that is, he had his right hand *under* his surtout, buttoned at top and bottom, and his left hand on his breast over his right hand. Capt. Carson then got up, and told the prisoner he had come to take peaceable possession of his house—that out of the house he must go. The prisoner then said, very well, and turning to Mrs. Carson, said, Ann, shall I go? Who replied, No, stay. The prisoner then went to the north-east corner, and Carson following him, told him again, and repeated, two or three times, he must leave the house—"my hands are tied—I have no weapon;" at this time he held his hands down by his side, and open, had nothing in his hands. Upon this, Smith drew a pistol from under his

PHILAD'A,
May, 1816.

The Com'rs
v.
Smith.

PHILAD'A,
 May, 1816.
 }
 The Com'th,
 v.
 Smith.
 surtout coat, and shot Carson in the mouth ; and throwing the pistol on the floor, ran down stairs as fast as he could. Capt. Baker pursued him, heard him tumble among the china, and overtook him on the step of the front door. Smith, the prisoner, when conveyed to gaol, had his nose injured, and bloody. The deceased declared in his last illness, that the prisoner had come in like a midnight assassin, and shot him like a coward. It was further in evidence, that Smith might have left the corner in the parlour without running against any body.

From this evidence, the question presented to you is, of what crime is the prisoner guilty ?

Murder in the first degree, is the wilful, deliberate, and premeditated killing another. There are various inferior kinds of homicide. But on the present indictment, our attention is confined to the consideration of the highest and most aggravated description of the crime.

Then let us ask, did the prisoner wilfully kill John Carson ?

It is not pretended there was any accident in the case. The killing, therefore, was wilful, and on purpose.

Was it deliberate and premeditated ? or was it the effects of a sudden passion, produced by a reasonable provocation ?

There is no evidence to show a sudden passion, or that the prisoner had, that evening, received any provocation from the deceased. All the witnesses who were

present agree, that Carson did not touch him, or lay the weight of his finger upon him.

PHILAD'A,
May, 1816.

The Com'th
v.
Smith.

The killing, therefore, was not the effect of a sudden passion : but was it deliberate, gentlemen ? Look at the prisoner standing in the entry, with the pistol buried under his surtout ; see him entering the parlor, in the same attitude, taking his stand, drawing the pistol, and coolly discharging it into the mouth of Carson, and ask yourselves whether this was not a most deliberate act.

Was the killing premeditated ? On Wednesday night he had prepared himself with pistols, and declared, if ever Carson entered the door, to lay hands on him, he would certainly shoot him. On Saturday evening he made a similar declaration. He did not, however, wait till Carson touched him, but shot him, without receiving from him the least personal injury, or even threat.

In the language of Chief Justice M'Kean, we add, that where a man, without uttering a word, strikes another man on the head with an axe, it is an act of premeditated violence.

What is the language of the court in the case of *The Commonwealth v. O'Hara* ? If the prisoner had time to think, and did intend to kill for a minute, it is wilful, deliberate and premeditated killing, as well as if he had intended to kill for an hour or a day.

With respect to the conduct of Carson at his own house, on Wednesday, in drawing a knife on Smith, it was altogether unjustifiable. What would have been the

PHILAD'A,
May, 1816.

The Com'th
v.
Smith.

consequence if he had killed him, we are not now called upon to decide. This we will say, that two wrongs cannot make a right; that Carson's violence on Wednesday can never justify Smith in deliberately killing Carson on the Saturday following.

Who is there among us that will justify assassination? Nobody, I trust. But it will be quite as easy to justify assassination on the principle of revenge, as the conduct of the prisoner in deliberately shooting Carson through the head three days after Carson had injured him.

Much has been said of the principle of self-defence, as applied to the prisoner; but with what propriety we are at a loss to discover. Who laid hands on him? who attacked him? who threatened him? who touched him?

He went voluntarily into the room, chose his station, and fired when he pleased. He was not dragged into the room, and there detained against his will. On the contrary, *he* only was armed, and under restraint from no person.

It has been said by one of the witnesses, that the pistols were procured for self-defence. If this be really the case, it is much to be lamented they were employed for a most mischievous and deadly purpose.

The dying declarations of John Carson are of weight in this cause, who averred, when he lost all hopes of living, that the prisoner had come like an assassin, and

shot him like a coward. This description of the offence of the prisoner accords very much with the representations of it given by the witnesses.

PHILAD'A,
May, 1816.


The Com'th
v.
Smith.

The flight of the prisoner is always, in the eye of the law, evidence of guilt. Smith had no sooner discharged the fatal instrument, than it was dashed on the floor, and he fled from the room with the utmost speed. His fall among the china, the difficulty of getting through the street door, which opened inwardly, and his stumbling at the front door, were the providential circumstances that prevented his escape.

The man who has committed no crime, in general faces his accusers, and maintains his innocence. On the other hand, the guilty creature, who knows he has exposed himself to the just vengeance of the law, is uniformly seen to endeavor to avoid by flight that punishment which he is conscious he has merited at every earthly tribunal.

A good deal has been said of the history of Captain Carson's life and character. Alas! gentlemen, it is the melancholy history of his death you are called upon to hear and to decide. He had settled his difference with his wife on Friday; and, anxious for re-union, had formed a plan of getting possession of his house on Saturday, the next day. He very naturally, therefore, sends for his wife's nearest connections to be witnesses of his ordering the prisoner to quit his house. It is plain, they were not sent for to assist him to take possession by force, because they came without arms, and no force was used. But, whatever was his motive, it was so or

PHILAD'A,
May, 1816.

The Com'th
v.
Smith.

dered by Providence, that it was an invitation to his death and funeral.

It is true, gentlemen, Smith did go on Saturday night to look for a magistrate, to turn Carson out, as he expressed it. Being disappointed, he resolved to take the law in his own hands, and deliberately procuring a pistol, went forward into the room where he knew Carson was, and coolly discharged its contents into his head.

Justice is certainly due to the prisoner in the bar—no body doubts it.

But is Justice due to Richard Smith only? Is no justice due to the public—is no justice due to society? Is the life of a man of no value? Is no atonement to be made to offended law, for the shedding of innocent blood? Judge for yourselves, gentlemen.

Punishment is not the province of a court and jury. Our rulers, the legislature of our country, have established a penal code, assigning to each crime its proper punishment. Upon this point we have no right to reason: acquiescence is our duty.

I will however observe, gentlemen, that the practice of all nations, civilized and barbarous, accords with the voice of religion, which is the voice of God: whoso sheddeth man's blood—that is, deliberately sheds it—by man shall his blood be shed.

What is the case before you in substance, and in a few words? It is this—

The prisoner having, by color and forms of law, acquired unlawful possession of the house of Carson, of his goods and chattels, of his wife and children, deliberately shot him afterwards in his own house, in the very act of peaceably demanding restitution of all that was dear to him.

PHILAD'A,
May, 1816.
The Com'th
v.
Smith.

It is a fine reflection of chief justice Hale—"Let me remember," says that great and good man, "when I find myself inclined to pity a criminal, that there is also pity due to the people and to the country."

The court have done their duty—it remains with you to do yours.

Remember, gentlemen, the vows of God are upon you, to decide according to law and to evidence.

We have stated both the law and the facts, and leave you to judge for yourselves; you have a right to determine both.

If you believe the witnesses, who were present and saw the crime committed, it is your duty to convict the prisoner of murder in the first degree; but if you do not believe the witnesses, it is your duty to acquit him.

The jury found the prisoner guilty, and he was executed in pursuance thereof.

CIRCUIT COURT U. S.

NEW YORK, SEPTEMBER, 1823.

X

<i>United States</i>	}	PIRACY.
vs.		
<i>Joseph Perez.</i>		

Messrs. *Tillotson* and *Haines*, counsel for the People.
 Messrs. *Hoffman* and *Nevin*, counsel for the Prisoner.

In calling the jury the panel was exhausted, and Dr. Roosa was selected as a talisman. He was objected to by the counsel for the prisoner, that he was a physician. The court overruled the objection, and a peremptory challenge was made.

It was permitted by the court, that the counsel for the prisoner might interrogate the jurors as they came to the book to be sworn, "whether they had expressed an opinion against the prisoner," and they were so interrogated.

Captain Edward Johnson testified, that he was a citizen of the United States, sole owner of the schooner Bee, and principal owner of her cargo. He sailed with her from Charleston, S. C., on the 20th of July, 1822, on a voyage to St. Juan de Remedios, in the island of Cuba. The vessel was of about 50 tons, and the cargo consisted of flour, rice, butter, lard, codfish, tin ware, watches, &c. On the 14th of August, being then about a mile and a half from the coast of Cuba, and not far

*This report of this trial is in
Harrison's Library.*

from the place of destination, saw a small schooner of about 30 tons coming out from under the land. She was Baltimore built, schooner rigged, apparently about 30 tons burthen, without a topsail, and hoisted Buenos Ayrean colors. She hailed the Bee, on which the anchor was let go, and a boat sent from the Bee on board of her. When the boat returned, witness was forward stooping down and paying out the cable: his first notice that the pirates were on board was their cutlasses, with which they began beating him with great violence. He had with him on board the Bee a sailing-master, whose name was Manuel Fernandez, a Portuguese, who spoke Spanish, James Debau, Joseph Porter, James Thompson, and a Portuguese passenger, who was taken in at Charleston, who spoke no English, and whose name the witness never knew. Fernandez interceded with the pirates, upon which they desisted from beating the witness. They then put a six pounder, which was on board the Bee, into the boat, together with colors, trumpets, and other light articles, and got the Bee under weigh, again running in till within half a mile of land, when they brought her to anchor, and laid the piratical schooner on the larboard side, close to her. At this time there were about twenty of them on board. They took off the tarpaulin, and one of them, who, according to the best of witness' knowledge and belief, was Joseph Perez, the prisoner, took a crowbar and drove it in once or twice into the hatch. They called for the axe of the cook, but before any thing further was done, witness was hurried on board the piratical schooner to assist in throwing out the ballast, for the purpose of lighting her so as to receive the cargo of the Bee. The witness then stated various acts of wantonness and cruelty during eight days, that were

N^W YORK,
Sept. 1823.
The U. States
v.
Perez.

N^W YORK,
Sept. 1823.

The U. States
v.
Perez.

inflicted on them by the pirates; the manner in which they sold off the greater part of the cargo to the people who flocked down from the country to purchase, and the arrival of a British schooner from New Providence, to whom the residue of the cargo was sold.

On the 22d of August, having disposed of all the cargo, the pirates got both schooners under weigh, and beat out to the entrance of the Keys, five or six miles from the main land, when witness was told by the carpenter that they were about to run the Bee ashore. This was soon after done, after taking two or three stretches upon West Salt Key. A small boat like a canoe was brought alongside, with one sail, and one oar and a half, some beef and water. They then ordered witness into the boat; he went in: they then ordered him out again, and he came out. On this the prisoner, Perez, came up to him, and ordered him to take down his small clothes; prisoner then examined the waistband and lining, searched witness' person for belts, and ripped open the lining of his hat and shoes, searching for money. Shortly afterwards the prisoner came up from below, and brought up a gold piece in his hand; he held it up towards witness' face, and said, "dis for you," meaning, as witness supposed, have you any more like this on board? Witness answered him, "No gold in America;" when the prize master, who could speak English, said, "No, no—no gold in America." Witness was now standing by the gunwale, when, turning round, he saw the prisoner take a long knife from his side, and cut the standing part of the fore-peak haulyards, for the purpose, as witness then thought, and still believes, of hanging the cook therewith. Prisoner called the cook, and made

a grasp at him, when the prize master called out, "No, no!" and then he desisted: They ordered witness, the passenger, and all the crew, except Debau, into the boat: there were five in the boat; Capt. Fernandez said they must not stand in shore, or the pirates would kill them all. They accordingly continued to stand out, till they ran down the hull of the piratical schooner; they soon after saw the Bee in a blaze. They then made for the land, (as the boat leaked exceedingly, and had to be bailed constantly by two men,) and got into the mouth of a creek near Matanzas, after being about four days at sea, and landed at Matanzas on the 27th, in the evening.

NEW YORK,
Sept. 1823.
The U. States
v.
Perez.

These facts being proved to the court and jury, no doubt existed that they amounted to piracy. Witnesses, however, were introduced who testified to facts that left some doubt whether the prisoner was the same person who committed the piracy upon Captain Johnson.

The case was summed up to the jury by Messrs. Nevins and Hoffman for the prisoner, and by Messrs. Haines and Tillotson for the United States.*

The court charged the jury about eight o'clock in the evening: they retired to consider upon their verdict, and returned into court before ten the same evening, when some points of law were explained to them, and they were again sent out, and about twelve o'clock they were discharged; they having previously informed the

* It is impossible in a work of this kind to insert the very able and eloquent addresses of the counsel; it would swell the work far beyond the limits laid down by the proprietors.

N^W YORK, court that they were equally divided, and that there was
 Sept. 1823. no prospect of their ever agreeing upon their verdict.

The U. States

v.
 Perez.

A motion was made to discharge the prisoner, by his counsel, on the ground that the court had no authority to discharge the jury but in extreme cases, and that this was not such a case.

The authorities are all collected in Crim. L. C. vol. 1, p. 475, 476.

The court were divided. Van Ness was of opinion the jury were discharged too soon. Justice Thompson decided upon the motion, that there need not be a physical impossibility to a unity of opinion. He decided, the court had power to discharge the jury in criminal cases, and that it rested in the sound discretion of the court, under all the circumstances of the case; that it was not necessary the jury should be so far exhausted as to be incapable of further discussion and deliberation, nor was it necessary that they should be disabled by sickness, intoxication, or mental derangement; it was enough that they could not agree—that there was a *moral* disability. In this case, the jury had been out near four hours; a length of time amply sufficient to agree upon their verdict, if they could. This was a plain question of fact for them to decide. There were no intricate questions of law in the case; a longer time ought to be afforded to the jury, where a case involved a great number of facts and points of law. It depended more upon the nature of the case, than upon any settled rule that could be laid down, for the discharge of the jury. If the jury could not make up their minds and agree upon their verdict in four hours, where the identity of the prisoner was the only question before them, it was probable they never could agree.

As the court were divided, no judgment was given.

The case will be argued at Washington, and the point settled by the Supreme Court.*

N^W YORK,
Sept. 1823.

The U. States
v.
Perez.

* Circuit Court of the U. States. Philadelphia, October, 1823. *Joseph Haskill* and *Charles Franshaw* were indicted for a piracy committed on board the schooner *Tattler*, on the 15th of September, 1823. The evidence, both on the part of the United States and for the prisoners, having been heard, the counsel summed up, and the jury were charged.

At eight o'clock the same evening the jury returned a verdict of guilty on the first count. Before the verdict was recorded, the counsel for the prisoners expressed an apprehension that one point in the charge of the court had been misunderstood by the jury; and entered into an explanation, which was objected to by the district attorney, but allowed by the court. One of the jurors then expressed his dissent from the verdict which had been given, believing, as he said, that the prisoners' conduct had arisen from fear. The court remanded the jury, and adjourned until the following morning. At 11 o'clock the next morning the jury again came in, and again delivered a verdict of guilty.

The counsel for the prisoner, having heard that one of the jurors had become insane since the last adjournment, required that the jury be polled; upon which the individual alluded to exhibited, by his answer, such decided proof of mental derangement, that the court refused to record the verdict. The district attorney now suggested that the insanity of the juror had probably arisen from want of food, and that if refreshment were allowed he might recover sufficiently to perform his duty. But the counsel for the prisoners did not feel themselves at liberty to agree to this proposal, declaring their determination to leave the responsibility of whatever might be done entirely with the court. The district attorney then offered to discharge the jury by agreement; but this also was declined. The jury was then remanded until the court should determine on the most advisable course.

It would seem, also, that the juror who dissented on the evening before, had not altered his opinion, but had been induced to agree to the verdict of guilty, under the impression that a written statement of his views, which he had prepared, might be permitted to accompany it.

CIRCUIT COURT U. S.
NEW YORK, SEPTEMBER, 1823.

United States }
vs. } MURDER.
William Gourlay. }

Present—Honorable *Smith Thompson*.

Honorable *William P. Van Ness*.

Messrs. *Tillotson* and *Haines*, Counsel for the U. States.

Messrs. *Van Wick*, *Baldwin*, *Scott*, and *Blunt*, Counsel
for the Prisoner.

On Friday, the 10th of September, at 9 o'clock in the morning, commenced the trial upon an indictment found

At two o'clock they again came to the bar, when the court discharged the jury, it being expressly understood that such discharge was without the consent of the prisoners' counsel, and directed the cause to be tried anew.

On Wednesday, the 22d, the prisoners, being called to the bar, offered by their counsel a special plea, setting forth the particulars of the former trial, and praying a discharge on the constitutional provision that no man shall be twice put in jeopardy for the same cause, and alleging the discharge of the former jury as equivalent to an acquittal. To this plea the attorney of the United States demurred, and the court directed an argument on its validity, which consumed the remainder of the day. On the following morning the court delivered a learned and elaborate opinion, overruling the plea of the prisoners, and directing the trial to proceed. This opinion was principally directed to two points: 1. That the lives of the prisoners had never been in jeopardy, as the words are applied in the constitution, and by the common law. 2. That the insanity of a juror is one of those cases of necessity in which the court may exercise a sound discretion to discharge a jury, it being essential for the due administration of justice.

at the present term of the court against William Gourlay, for murder. The following jurors were examined and sworn, viz.: Calvin W. Howe, William Finch, Daniel Oakley, John S. Bradford, Nathaniel Rathbone, Smith Lane, Daniel Banvard, Samuel Maverick, Samuel Dixon, Dennison Wood, Lyman Fitch, and John Reid. The indictment was read, consisting of three counts, of which the first charged the offence to have been committed in a bay, the second in a haven, and the third on the high seas, near Cadiz, in the kingdom of Spain.

N^W YORK,
Sept. 1823.

The U. States
v.
Gourlay.

Mr. Tillotson opened the case for the United States, and observed, that he deemed it proper to state explicitly, not only the facts and circumstances attending the offence which was charged, but also the law by which those facts were to be governed. In civil cases, questions of law were referred to the court; but in criminal trials, the jury were made the judges as well of the law as of the facts. In this case, the grand jury had charged the prisoner with wilful murder; and if the fact of the killing be proved by the United States upon the prisoner, the law would presume it to have been done with malice. It would then rest upon the accused to produce such circumstances of mitigation as would reduce the crime from the highest grade of homicide. He should expect, in order to substantiate the charge, to show: 1st. The killing; 2d. That it was done by the prisoner; and 3dly. That it was done within the jurisdiction of this court. The facts, as he understood, were briefly these:

That on the 14th of June last, the ship Canton was lying in the bay of Cadiz, in an open roadstead, where the sea was flowing in, on board of which the offence

N^W YORK,
Sept. 1823.

The U. States
v.
Gourlay.

charged was perpetrated by the prisoner upon William Jones. The Canton was an American ship, of which the master was then on shore; the prisoner the first, and the deceased the second mate. In the afternoon of that day, a quarrel had been sought, authority oppressively exercised, and a blow given by the prisoner. At the close of the evening, Jones went into the berth assigned him by the captain, which was in a single state-room, the berths being placed the one over the other. Gourlay came down and ordered Jones out of his berth. The latter refused, when Gourlay pulled off the clothes, and left him naked. Jones then jumped out, a struggle ensued, which continued until they got out of the state-room into the main cabin. Gourlay then cried murder, and an indentation appeared from Jones' teeth. Jones, it would be proved, was about 21 years of age, a humble, tranquil, feeble young man, whilst the prisoner, as the jury would observe, was stout and athletic. After they had been disengaged from the struggle, Gourlay looked steadfastly for some time at the deceased, and then said, "By God! I'll shoot you," stepped back into his room, took his pistol, levelled it, and shot him dead on the spot. These were the facts, as Mr. Tillotson was advised, and he presumed no effort would be made to reduce the grade of the crime below that of manslaughter.

Mr. Tillotson then cited various authorities to show from the cases found in the books, that the present was not a case of manslaughter, but of murder. Among them were 1 East, 233, Notes to Chitty's C. L., and 3 Chitty, 730. The prisoner was indicted under the 8th section of the act of congress entitled "an act for the punishment of certain crimes against the United

States," passed 30th April, 1790. That section declares, "that if any person or persons shall commit, upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death *** being thereof convicted, shall suffer death." Should the jury, on the question of jurisdiction entertain doubts, whether the United States intended to punish murder in cases like the present, he presumed the jury would find the facts specially, so that the question might be revised and finally determined by the Supreme Court of the United States. Such a course would be decorous and correct, and it would be peculiarly proper, inasmuch as a general verdict (the jury being judges both of the law and the fact) would be conclusive, and could never be revised.

N^W YORK,
Sept. 1823.

The U. States
v.
Gourlay.

Captain Charles McCauley was sworn on the part of the prosecution. He commanded the ship Canton on the 14th of June; but was absent on shore at the time the affray happened. The ship lay about a mile from the molehead in Cadiz, and about two and a half miles from Fort Catalina, on the opposite side, which is fortified, and now occupied by the French. It was far in from the chops of the harbour. It is about seven and a half miles from Rota to Cadiz, and about three miles from Fort Catalina, to the Fort Escaronada, (towards Rota,) opposite Cadiz. The water is about five or six fathom. All within the point of Rota and the Fort St. Sebastians is called and occupied as the Bay of Cadiz.

N^W YORK,
Sept. 1823.

The U. States
v.
Gourlay.

The Canton did not approach nearer Cadiz on account of the shallowness of the water. She came to anchor, unloaded and loaded in that place. In the winter such ships go farther in. It is the usual place for mooring such ships. Had just discharged the ship the day of the affair. The King of Spain entered Cadiz the next day after. The Canton was an American ship. Her owners were Americans.

Thomas M'Cready identified and proved the register of the ship Canton, and its American character.

Jacob Smith was a carpenter on board the ship Canton, on the 14th of June, in the port of Cadiz. About sunset he put away his tools. A lighter was alongside the ship with salt; and as the ship was short of hands, and wished to discharge the lighter, witness laid to and assisted in taking out the salt. A little past 9 o'clock witness missed the prisoner, by whom he was soon after called down into the cabin. Knew not what Gourlay wanted, but went down. Gourlay addressed him, and said, "Carpenter, I have brought you, and Vesey, and the steward down to witness that I order Mr. Jones out of the berth." Does not recollect he said this or that berth; deceased was then lying in his own berth. Gourlay repeated the order to Jones to get out. Jones replied he would not go out alive; that, he said, was the place appointed by the captain for him to sleep, and there he would sleep. Prisoner turned round and said, "Carpenter, haul that man out of his berth." Witness refused, stating that he was willing to obey his orders, but unwilling to drag the man out of his berth, for he didn't know the consequence. Prisoner then pulled the bed-

clothes from Jones; seized and dragged him into the dining room, where they had a clinch together, and in passing the mahogany table they nearly capsized it in the scuffle. Witness put his hand on the table, and held it till they passed it. He went on deck, leaving them scuffling, and asked the men to go down and part the two mates, or they would kill each other. A man named Jones, (not the deceased) said, "let them fight, it's none of our business."

N^W YORK,
Sept. 1898.

The U. States
v.
Gourlay.

Whilst receiving this answer, murder was cried in the cabin, in about a minute after witness left it. Witness went down, and prisoner held up his hand, and said, "This man has bit me." It was on the left hand; a slight wound which bled a little; also a small wound on the cheek. Gourlay and deceased were then clinched; Jones being partly down on his knees, and Gourlay above him, and had the command of him. There was a little place on the side of Gourlay's cheek, and the blood running from his hand. Witness, with his right hand, laid hold of Gourlay by his left arm, and of Jones with his other by the shoulder, and thus separated them. Jones was a small man, five feet three inches high. Knows his height, for he made his coffin. Begged Jones to go on deck. Deceased said, "Where shall I go? Am I to be murdered?" Witness told Jones to go on deck and sleep in Black's berth, in the fore-castle. Black was then on shore. "You say you are going to leave the ship to-morrow. Gourlay (the prisoner) says he is going to leave the ship to-morrow. Go, and stay in the fore-castle to-night: Gourlay is in a passion now, and in the morning, when the captain returns, all will be well." Jones was then standing with his back near the com-

N^W YORK,
Sept. 1823.

The U. States
v.
Gourlay.

panion way, and the prisoner with his back to the state-room door. They were about four feet apart, and the witness about four feet from them. Gourlay then said, "By God I'll shoot you"—stepped back about a foot, reached back his arm, took down a brass pistol, cocked it, and shot him dead. Prisoner had two pistols, usually loaded, suspended over the berth where he slept. Witness took the candle, then standing on the table, looked upon Jones, and perceived he was dead. He did not stir—turned and said, "Mr. Gourlay, you have killed the man." Gourlay replied, "I can't help it; he ought to have obeyed my orders." Witness, Wm. Vesey, and George Brown, were the only persons present at the time Jones was killed. The men on deck, hearing the report of a pistol, came below. They insisted upon prisoner's being immediately put in irons, and kept in that way until the captain returned in the morning. It was done, and he remained so until morning, when, as soon as witness thought he could get into the city, he took a boat, went ashore, and found Capt. M'Cauley, to whom he related the facts. Captain M'Cauley, Captain O'Sullivan, the American deputy consul, and four Spanish soldiers, came on board, took Gourlay ashore, took off his irons, and put him in prison in Cadiz, where he remained until the vessel was ready to sail. Witness supposes he was taken ashore by order of the deputy consul.

In answer to questions by Mr. Tillotson, witness said he thought it was about two minutes from the time the struggle ended, to the time that the pistol was fired, and the deceased shot. In this time, witness gave the advice above stated; and prisoner moved along in the mean

time to near the state-room where the pistol was. The wounds of the prisoner were, one on his knuckles, and the other on his cheek; does not know whether either was a bite or not. The deceased had no weapon of any kind in his hand.

N^W YORK,
Sept 1823.
The U. States
v.
Gourlay.

Mr. Blunt, of counsel for the prisoner, requested that the other witnesses be removed while the witness was under examination. The Court granted the request.

Witness continued. In the afternoon previous to the alleged murder, at four o'clock, the deceased had three or four men in the hold, trimming or stowing salt. Deceased could not please the prisoner, who quarrelled with him in the hold, and called him a damned worthless scoundrel. Deceased came on deck, and said he would have nothing more to do with the ship, and would quit when the captain came on board. A few words passed, when prisoner struck the deceased on the head. A scuffle ensued, and the parties were directly separated, and prisoner told witness to go below and get the irons, and put Jones in them. Witness went and got them, and came on deck, and found deceased with the cook's tormentors, or flesh fork, in his hands, and swore he would not be put in irons alive. Prisoner seized the deceased to take away the instrument, but could not do it. Witness, by order, took hold of one end of it, but soon let go; thought he would let Gourlay get them away himself.

Gourlay then ordered Vesey to get the cutlass. Vesey got it; Gourlay received it, but soon afterwards put it away, saying, "I will not use such a thing against you."

N^W YORK,
Sept. 1823.

The U. States
v.
Gourlay.

Prisoner then ordered a pair of pistols to be brought up. Yesey brought the pistols, and laid them down under the dripstone, aft of the companion. Did not know whether Gourlay knew the pistols were there. Prisoner succeeded in getting away the tormentors from deceased, and threw them overboard. From that time nothing further than words occurred until sundown. Had words after that. Jones was not put in irons. Deceased was shot under the left eye, near the nose. Died immediately. Did not move. Thinks the ball did not pass through the head.

Cross-examined by Messrs. Blunt and Scott.—Witness had a little dispute with prisoner, but more with deceased. About three weeks previous he was about putting on the fore hatch bar, and prisoner told him, (witness) to go to hell, and struck him. Witness took up the handspike, but laid it down, and did not strike, an explanation having taken place.

Witness had always treated prisoner as a brother. Prisoner once took witness forward in a state of intoxication from the cabin. Witness was asleep, and didn't know whether he refused to go. It was some time before this affair, three or four weeks, while in Cadiz. No ill will was entertained by witness against prisoner. He did not see the whole transaction. Went on deck and heard prisoner's voice cry murder, and went down as before stated. Deceased did not strike prisoner in the eye previous to taking the pistol. Didn't notice that prisoner had a black eye. There was a black spot on his cheek. Does not know how it came. Saw the parties both looking at each other. The deceased was

not in the attitude of fighting. Deceased had nothing on but his shirt when dragged from his berth. Prisoner is an Englishman. Jones retired to his berth, refusing to do any more duty, while others were busy at work. Prisoner did not say, when he commanded Jones to leave his berth, "come out and do your duty;" but "go out of this place, I am afraid of you." Prisoner expressed fear of his life, if deceased remained there. Prisoner was quarrelsome, and deceased more so. The crew were busy at work three hours after deceased had quit labour. When the Captain left the vessel his direction to prisoner was to get the salt aboard, that we might not be compelled to work on Sunday. It was then Saturday. It was not exactly an order, but he expressed it as his wish and expectation, and directed prisoner to give an extra glass of grog to get it finished. When prisoner said "by God I'll shoot you," deceased replied, "I can't help it." Witness was examined by the deputy consul, who is a Spaniard, and speaks broken English, and heard the examination read once or twice since his arrival here. He now speaks from recollection, and his testimony would be the same if he had not heard that examination read. He was examined on board the ship. No Spanish officer was present. He remembers the transaction perfectly well. Witness does not recollect that prisoner ordered deceased to leave the cabin: after the cry of murder, went down. A little before he shot, he said, get out of my sight."

N^W YORK,
Sept. 1823.
The U. States
v.
Gourlay.

William Vesey, a young man, apparently about 17 or 18 years of age, was next called. He was a mariner on board the Canton. Saw Gourlay, the prisoner, go into the cabin with a candle in his hand. It was about nine

N^W YORK,
Sept. 1823.

The U. States
v.
Gourlay.

o'clock. Witness was in the cabin. Gourlay says to Jones, "Come out of that cabin, you shall not sleep there to night." Jones was then undressed in the berth, where he had been, probably, about an hour. Gourlay added, "My life is not safe if you sleep there: come out, and you shall have as good a bed as I have; but you shall not sleep under me, for my life is not safe." Deceased replied, "No, I'll not come out." Prisoner rejoined, "I'll make you." Prisoner then went on deck, called down the carpenter, (Jacob Smith,) the steward, and himself, (Vesey,) for witnesses, and said to us, "I call you down to be witnesses, that I order Jones out of that berth." The prisoner then ordered him out again; deceased replied he would not come out alive. Prisoner then directed the carpenter to lend a hand, who said no, he did not like to do that. Prisoner replied, "then I must do it myself," and began pulling off the clothes, continuing to order deceased out. When prisoner had stripped the bed, deceased got up, and sat in the bed. Prisoner took him by the arm, and eased him out of the berth. No violence was offered, and no resistance attempted. Both went into the cabin together: as they approached the cabin door, prisoner shoved deceased, but not so as to hurt him; and here they closed and had a good deal of struggle. Prisoner cried murder, and sung out "O my God, he is biting me." The carpenter then rushed between, and parted them, begging deceased to go forward and sleep in the forecastle. Deceased replied no, he would not go forward, but would sleep in the place appointed by the Captain. Jones then said, "what shall I do? am I to be murdered?" This was just as they let go. Prisoner immediately upon that

said, "By God! I'll shoot him," (not you, as Smith stated,) addressing himself, as witness supposed, to the carpenter, and, in the act of saying so, made a rush to the door, squeezing himself through it sidewise into the state-room, took the pistol from his berth, and shot the deceased through the half-door; for the cabin door being open, half shut the state-room door. Deceased died immediately. Thinks the pistols were previously cocked, for witness often made up prisoner's bed, and found them cocked, and half-cocked them himself. Gourlay had a pair of pistols. Did not see the other pistol, whether it was cocked or not. Witness was of the opinion that not more than fourteen seconds elapsed from the time the prisoner uttered the words, "By God! I'll shoot him," before he executed the deed. It was not more than a minute from the parting in the scuffle to the time of shooting. Gourlay was standing still and looking at Jones, whilst Jones said, "What am I to do—am I to be murdered?" Prisoner appeared to be in a great rage. In the course of the afternoon, Jones said he would do no more duty until he had seen Captain O'Sullivan. Gourlay said Jones did not do his work properly. Gourlay struck him in the face, but left no mark, nor did it stagger him. Deceased doubled his fist, and said to prisoner, Look out. Gourlay said to Jones, Go on shore. Jones said he would if Gourlay would let him have a boat, Gourlay said he would'nt give him a boat. Gourlay then said, I will put you in irons, and ordered the carpenter to bring the irons up. Deceased declared he would not be put in irons alive. Prisoner replied, Well, see if I don't, and ordered witness to bring him a cutlass, which he brought, and Gourlay laid it on the hatch, but did not use it. Jones made a rush, and got a pair of tormentors,

N^W YORK,
Sept. 1823.

The U. States
v.
Gourlay.

N^W YORK, Sept. 1823.
 The U. States
 v.
 Gourlay.

Gourlay seeing it, came up, and after considerable struggle got them out of Jones' hands, and threw them overboard. This was about 5 or 6 o'clock in the evening. They then parted. Witness brought two pistols to prisoner, shook out the priming on his way, and placed them under the dripping stone. Did not hear Gourlay order Jones to leave the cabin after the scuffle; he had not time. It was over like a flash of lightning. Jones was small, but pretty strong. Gourlay was then sick of the liver complaint. Has seen Jones clinch a larger man than himself. Captain did not assign any berth, but Jones usually slept in that he lay down in.

Cross-examined by Mr. Baldwin. Gourlay quarrelled with the cook, because cook let Jones have the tormentors, and ordered witness to get pistols to intimidate the cook. Witness brought the pistols, but shook the priming out, for which Gourlay afterwards thanked witness, and said he had lived thus long without murdering any one, and should be sorry to have that crime attached to his name. In the afternoon, Gourlay said to the men, "Will you obey me?" They said yes. He replied, "Then I order you not to obey that man," meaning Jones. The priming was knocked out before sundown. Gourlay took the pistols in the cabin with him, and probably primed them for the use of the ship again. Gourlay was mostly upon deck that afternoon and evening. He went down once to put on a shirt, his own being nearly torn off in one of the frays. The act of shooting was almost instantaneous after the separation. Gourlay's shirt collar was torn off.

George Brown, a black boy, who was steward on

board the Canton, testified that Gourlay ordered Jones out of the berth. Jones refused. Gourlay then called for help, and the carpenter came, but refused to assist. Gourlay then took him out. They then struggled, and Jones bit Gourlay, and Gourlay called out murder; and Jones let Gourlay go. Jones was biting Gourlay. Gourlay then stepped back, and said, "By God! I'll shoot you." Did not see the carpenter part them. They were struggling a couple of minutes. About a minute after separation Gourlay shot Jones.

N^W YORK,
Sept. 1823.
The U. States
v.
Gourlay.

John Ray. The wound was on the left side of Jones' face, under the eye. Did not see the affray.

Here the prosecution rested. A recess of half an hour was given, when the prisoner's defence commenced.

Mr. Scott commenced the defence, on the part of the prisoner, and occupied the floor nearly two hours. He adverted to the doctrine of homicide *se defendendo*; and although he did not place this case distinctly on that ground, yet he explained and enforced to the jury the authorities on that question, submitting to them whether a mutinous disobedience to the lawful authority of the prisoner, acting, in absence of the captain, as commander of the ship, would not justify his act, on the ground that he was authorized to use as much force as was requisite to carry into effect his lawful commands. 4 Bl. Com. 183. Mr. Scott also insisted that the crime of which the prisoner was guilty, at most, was manslaughter, and not murder; and for this he cited the following authorities: 4 Bl. Com. 193, 1 East, 224, 232, and Rowley's case, and the case of the Scotch sol-

N^W YORK,
Sept. 1823.

The U. States
v.
Gourlay.

dier, 1. East, 251. He further contended that the court had no jurisdiction of the case. It was a crime, he said, committed in the harbor of Cadiz, within the jurisdiction and sovereignty of Spain; that sovereignty must, in its nature, be exclusive and absolute, and cannot be concurrent. He referred to, and commented upon, the following authorities: 1 Azuni, 222, 233, 234, 235, art. 3; Hubner, p. 244; Vattel, 187, § 287, p. 236; United States v. Rice, 4 Wheaton, 246; 4 Cranch, 136, S. P., 144, 145, S. P.; United States v. Palmer, 4 Wheaton, 633; 1 Gallison, 625; United States v. Wiltberger, 3 Wheaton, 94, 95.

Don Thomas Stoughton, the Spanish consul, was then called and sworn. He defined what he considered to be the bay of Cadiz, and gave it as his opinion that the Spanish authorities had always exercised jurisdiction over the waters, not only where the Canton lay, but all that extent within a line drawn from Rota to the castle of St. Sebastians, the extreme point of the peninsula of Cadiz. Had never heard it doubted.

Hugh Roberts was born in Cadiz, and resided there many years. Considered the bay of Cadiz less extensive than last witness. Supposed it to be included within a line from fort Catalina direct to Cadiz. The position of the Canton would still be within it. The outer part of the bay from the line referred to, he considered as open road.

Captain M'Cauley was called again, and stated the instructions he had given prisoner to have the salt taken in that afternoon. Considered all the waters within a

line from Rota to St. Sebastians as forming the harbor of N^W YORK, Cadiz. Gourlay was taken on shore by the American deputy consul, assisted by the Spanish authorities. Knew of no refusal on the part of the Spanish authorities to take cognizance of the offence. Jones had served on board the ship but two or three days. Gourlay had been employed but a few days. Had perceived neither of them to be quarrelsome.

Sept. 1823.
The U. States
v.
Gourlay.

The testimony here closed on both sides, and Mr. Haines, associate counsel with the district attorney, stated the authorities to be adduced in support of the points of law which the prosecution would assume.

Mr. Van Wyck, in summing up for the prisoner, expressed a confidence that he would receive at the hands of the jury the same measure of justice as if he were one of our own citizens. And the melancholy case before them, he observed, exemplified the feeble hold we have on life. Neither the prisoner nor the deceased were aware that in so short a period the latter would be precipitated into eternity. Whether the agency of the prisoner in causing that event was the result of premeditated malice, and a hardened heart, or whether it was produced by the impulse of sudden passion, was the momentous inquiry which the jury were called upon to try. Had he been tried by the Spanish authorities, no jury would have interposed; and whether the circumstance of his falling into the hands of the American consul may have been favorable to him or not, yet if this court has not jurisdiction of the offence, the jury were bound on their oaths to acquit. If the Spanish government had cognizance of this case, this court has not.

N^W YORK,
Sept. 1823.

~
The U. States
v.
Gourlay.

It would not do to say, that because the Spanish authorities did not try him, therefore we will. The jury were acting as agents of the government, and were bound to administer justice according to law. The several states of the union made a constitution, by which they delegated part of their sovereignty to congress. Whatever they did not impart, they retained. By the eighth section of the constitution, authority was given to congress "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." To felonies committed on the high seas, and to none other is this authority, derived from the constitution, to be applied. But the act of 1790, in conformity to which this indictment is drawn, would seem to have reference, not merely to the United States, but to all the rivers, havens, basins and bays in the whole world. But congress can legislate only for those persons who owe allegiance to the United States. The construction contended for would make it assume a jurisdiction over the bays, rivers, and harbors of all Europe. Such cannot be the true construction of the act. If it were to be allowed, our jurisdiction would extend up the Thames, the Rhone and the Danube. Our government could not have the hardihood to claim it. Our system of jurisprudence was derived from England, and by the law of that realm offences were to be punished in the place where they were committed. It is competent for congress to give construction to the term high seas, in our own, but not in a foreign country. If they have not power to pass laws to punish crimes committed in the territories of Spain, they have not power to invest a court with that authority. This was not a crime against the peace and dignity of the United States, but of Spain.

The act of the consul does not confer jurisdiction on this court. There was no power in Spain, unless that specially of the king, which could surrender and transfer the prisoner from the jurisdiction of that country. And what a precedent would such a decision create! Suppose a felony be committed on board an American ship, lying in the Thames. The accused is entitled to the benefit of testimony; and what shall be done? The witnesses, many of them perhaps Englishmen, are to be taken on board and brought to New York to attend the trial! Thus the ships of the United States are to be freighted back with felons and witnesses. Suppose a British ship is at anchor in the harbor of New York, on board of which a homicide is committed upon a custom-house officer, would we not claim jurisdiction, and try the offence? Or suppose the reverse, that a custom-house officer had killed a British seaman, would we endure it, that the offender, and all the witnesses to the act, should be transported to Great Britain for the trial of the accused? Or suppose, in the very case of the Canton, that the prisoner, on board that ship, in the bay of Cadiz, had killed, instead of William Jones, a Spanish grandee, or custom-house officer of Spain, would the authorities of that country have suffered him to be taken to America for trial? The vice-consul, it is true, assumed the power of judge, jury, and police officer; but this assumption can give no jurisdiction to the court. Mr. Van Wyck then commented ably, and at large, upon the facts as proved, which he contended did not make out the charge as set forth in the indictment.

N^W YORK,
Sept. 1823.
The U. States
v.
Gourlay.

Mr. Baldwin, on the same side, observed that there was certainly some difficulty in determining whether this case

N^W YORK,
Sept. 1823.

The U. States

v.
Gourlay.

came under the jurisdiction of the court. It took place in the bay of Cadiz, within the acknowledged jurisdiction of Spain ; and to decide that it is subject to the authority of this court, would necessarily involve the principle that a man may be tried twice for the one offence. This was abhorrent to our own laws and the laws of England. Piracy presents a different question. There, a first would be a bar to a second trial ; for, it being a crime against all nations, each has the right to make its own laws to punish it. It will be objected that Great Britain assumes jurisdiction of offences committed on board her ships all over the world. But the parliament of Great Britain is said to be omnipotent. The constitution of the United States is limited, and we cannot follow their example. Mr. Baldwin adverted to the differences in the definition of the high seas, as construed by the common law and admiralty courts, and contended that however the construction might be in relation to them, yet the true intent and meaning of Congress, in the act referred to, was that the high seas were those waters over which all nations had the right of passing, but neither had the exclusive jurisdiction ; and that the words havens, bays, &c., were meant to provide for cases wherein, like the river La Plata, the mouth is so wide that jurisdiction cannot be exercised from the shore, or bays, like those of Bengal, Biscay, or Honduras. Mr. Baldwin commented, at considerable length, upon the construction of the law, as applied to the case, and adverted to 1 Gallison's Reports, 625 ; Ross' Case, 5 Wheaton, 200, and § 43 of Graydon's Digest, and concluded his remarks by an address to the jury upon the matters of fact in evidence.

Mr. Haines, on the part of the prosecution, contended for the positions which follow. Our limits preclude the illustrations and arguments by which they were enforced. He argued,

NEW YORK,
Sept. 1823.
The U. States
v.
Gourlay.

1. That the murder was committed on the high seas.
2. That the 8th section of the statute of Congress, passed in 1790, clearly included the crime, even admitting that it was committed on the high seas.
3. That Congress has the constitutional power to pass the law alluded to; and
4. That the crime committed by the prisoner was murder, and not manslaughter.

Mr. Tillotson, district attorney, concluded the argument in support of the prosecution, and confined his remarks principally to an exposition of the facts, and the grade of crime to which they necessarily pointed. His observations were perspicuous and liberal, and occupied the court until 11 o'clock in the evening. Judge Thompson then addressed the Jury, and presented to them the law and the facts, in a very able and clear point of view. At half past 11 the Jury were sent out, and returned at one o'clock on Saturday morning, with a special verdict—guilty of murder in the bay of Cadiz. This verdict leaves the question of jurisdiction, which was an important point in the trial, open for revision. The Judge stated that he was not clear upon the point, and suggested to the jury the verdict they gave, should they

NEW YORK, be satisfied that the crime in its nature amounted to murder. The cause will be carried up to the Supreme Court of the United States.
 Sept. 1823.
 v.
 Gourlay.

GENERAL SESSIONS.

NEW YORK, NOVEMBER, 1823.

The People
 vs.
Thomas Ward. } MANSLAUGHTER.

Maxwell, District Attorney, for the prosecution.
John L. Graham, John A. Graham, Wm. M. Price,
 and *John Anthon, Esqrs.* Counsel for the Prisoner.

The jury were called, and the following oath administered to them: "You do swear that you will true answers give touching your competency as an impartial juror between the people of the state of New-York, and Thomas Ward, the prisoner at the bar."

After they were sworn, the following questions were propounded to them: "Have you heard any thing of this case?" "Do you feel any prejudice for or against the prisoner at the bar?"

Upon their answering in the negative to the last question they took their seats.

The prisoner was charged in an indictment for manslaughter, with having wilfully and feloniously killed Albert Robinson, by a blow inflicted on the 17th of October last, on his temple, by the rung of a cart.

N^W YORK,
Nov. 1893.
The People
v.
Ward.

The prisoner was a young man of good appearance and respectable deportment, apparently about 26 years of age, and by occupation a cartman. The testimony in relation to the facts was remarkably clear and consistent. The witnesses were evidently persons of intelligence and veracity, and the principal question for the jury to try rested upon the character and legal description of the offence.

Mr. Maxwell opened the case on the part of the people, and made an exposition of the facts he expected to prove, and of the law as applicable to them. He cited 3 Chitty's C. L. 730. *in notis*. The testimony in support of the prosecution was then introduced.

Dr. Marinus Willet, junr. surgeon of the New York Hospital, to which the deceased had been taken, testified that he examined the head of Robinson, and found little evidence of serious injury on the external part of it. There were symptoms, however, of a compression of the brain, and there was a bruise over the right eyelid, extending from above the temple, 2 1-2 or 3 inches down upon the cheek, which appeared to be such a one as might have been produced by a blow. The patient was brought in on the evening of Saturday, and on Sunday evening the operation of trepanning was performed by Dr. Mott. The skull was found to be fractured, but not so badly but the patient, had no other injury existed,

N^W YORK,
Nov. 1823.

The People
v.
Ward.

might have recovered by the application of ordinary remedies. The death of Robinson, which took place about 3 o'clock on Monday morning, was occasioned, as witness believes, not by the fracture, but by the rupture of a blood-vessel, the artery of the dura mater, and the extravasation of blood on the brain. Believes the blow to have occasioned the death.

Peter Bogert, a cartman, testified, that he was returning home on the evening of the affray; it was between six and seven o'clock, not very dark, but the lamps were lighted. Three carts were passing down Chamber street; the first Ward's, the second Fash's, and the third that of the witness. Observed Robinson, the deceased, passing down the flagging, which is laid, transversely, from the corner of Chamber and Chapel to the east side of Hudson street. He had a tin kettle in his hand, and was going the same way with Ward. Being within about two feet of Ward's cart, (who was upon a walk,) he turned round, and seized his horse by the head with his left hand. The horse sprung from him, and turned upon the side walk, with so much power and violence as to have nearly thrown Ward from his cart. Ward was very near the side walk at the time, and as he was turning into Chapel street, and deceased into Hudson street, where those streets form an acute angle, the further they advanced, the less they were incommoded by each other. When Robinson thus took hold of the horse's bridle, Ward laid hold of his monachie, and threw it at him. [Monachie is said to be a Dutch word, and was explained to mean a fore rung of the cart, to which the lines were occasionally made fast, about three feet long, three inches by two and a half in thickness, at the bottom,

and lessening almost to a point at the top, usually made of oak or hickory.] The monachie thus thrown by Ward did not hit deceased; but the latter picked it up, drew it across his shoulders with both hands, in a threatening attitude towards Ward, as if with intention to strike him. Ward's cart, however, had at this time so far advanced that he was not within striking distance, being about three feet from the tail of the cart. Thereupon, and almost simultaneously, Ward stopped his horse, stepped to the tail of his cart, sprang from it towards Robinson, and, in a momentary scuffle, wrested the monachie from his hand, shoved him back a foot or two, and with both hands hold of the instrument, knocked him down with it by a blow on the right side of the head. At the moment of striking, Ward said to deceased, "You damn'd son of a bitch, a little more and you would have thrown me from my cart!" But the word and the blow seemed together, and witness never knew an affray more rapid from its commencement to its conclusion. It seemed to be the transaction of a moment. Robinson fell, and Ward jumped upon his cart, taking the monachie with him, passed on about 25 feet, then stopped, hooked his wheel, and came back; but seeing Mr. Ryder with the man up, he again mounted his cart, and rode off altogether.

N^W YORK,
Nov. 1823.

The People
v.
Ward.

On his cross-examination, witness testified that he knew neither Ward nor Robinson previous to the transaction. Ward had a leather trunk and a roll of carpeting on his cart at the time. Deceased had no offensive weapon, but was in no danger from Ward's horse, which, when seized, was quite restive. When Ryder took up deceased, he called him by name, and also spoke to

N^W YORK, Nov. 1823.
 The People
 v.
 Ward.

prisoner, and said, "Ward ! for shame ! you ought not to strike a man so." Could not say whether Robinson was intoxicated or not, nor for what reason he seized the horse. Was knocked down by the side of witness' cart ; done very quick ; and the whole almost one act. Robinson picked up the monachie by the wheel—was a stouter man than Ward.

Daniel Fash, a cartman, who followed Ward at the time of the affray, confirmed, in all its essential particulars, the statement made by Bogert. He saw the monachie thrown at Robinson by Ward. It flew over his head, at the distance of about two feet above it. On his cross-examination, he stated that he remained at the place until Mr. Ryder had raised up deceased. The hat of the latter was not struck off by the blow. As witness was going down Hudson street, and Ward down Chapel, it brought Robinson between their carts, but the further off as they progressed, as the streets diverged in different directions.

Richard G. Ryder, who was also a cartman, came up just at the time Robinson held the monachie in his hand in an attitude of hostility to Ward. Saw Ward strike with the stick. It was but one blow. The man fell, and witness jumped off to his relief. Found it was Robinson, whom he knew ; and, seeing that the person who struck him was the prisoner, whom he also knew, he cried "shame" to Ward. Robinson laid lifeless as a log, and totally insensible. Ward removed off a few feet, where he remained. Witness raised up deceased, and asked him if he knew him. Deceased nodded assent ; witness helped him across the street, washed

the blood from his face, and, at the instance of a young gentleman who came up, bathed his wounds also with spirits. Deceased then jumped upon his feet, refused to be carried home by witness on his cart, jerked away, and said he could go home alone. Acted as if he was intoxicated, for he went down Chamber street, which was not his way home. Had known deceased twelve or fourteen years. Heard Ward only say, in reply to a suggestion of witness that a cartman had struck deceased with the rung of his cart, that "it was not with his rung, but with his monachie." Ward gave no indications of regret. Had known him about eighteen months, and considered him a mild and worthy young man. Robinson formerly drove a cart. Did not speak until his head had been washed by the spirits.

N^W YORK,
Nov. 1823.

The People
v.
Ward.

Dr. Willet was called again, and stated some further particulars relative to the trepanning. A piece of fractured bone was removed. The rupture of the blood vessel could not have been occasioned by the trepanning, for the blood on the brain was not only extravasated, but coagulated.

The defence of the prisoner was opened by John L. Graham, Esq., in a neat and appropriate speech, in which he commented with force and eloquence on the law and the testimony as applied to the case.

In behalf of the prisoner it was proved, by Robert Castles, that the deceased appeared to be intoxicated in the afternoon of the affray, and by Peter Nodine, and Joseph Archer, that he was a bad tempered man, passionate, perverse, and occasionally intemperate.

N^W YORK,
Nov. 1823.

The People
v.
Ward.

Ralph Olmstead, Robert Hyslop, Rufus L. Lord, Henry Hepburn, Charles Squire, Calvin W. Howe, and Allen C. Lee, all respectable merchants in the city, testified in substance that they had been acquainted with the prisoner for three or four years past; that he had uniformly manifested a mild and amiable disposition, rather timid than quarrelsome, and more disposed to yield than rigorously to assert his rights. That he was uniformly temperate, courteous and obliging, industrious and honest, and supported by his labor a mother and two or three sisters.

Dr. Jeremiah D. Fowler, of Mount Pleasant, the birth-place of the prisoner, testified that he had known him about 17 years, and from a boy. His disposition had always appeared to be mild and good; and his connections in Westchester were respectable.

Robert K. Foster had known the prisoner from 1810 to 1816, during which time he was an apprentice to witness, and appeared to possess the best disposition of any apprentice witness ever had. Witness was a shoemaker. Prisoner served out the full time of his engagement without indentures.

Dr. Richard L. Walker considered trepanning a dangerous operation. Patients often die from the inflammation occasioned by it, who might have recovered from the injury it was intended to remedy. The coagulated blood referred to by Dr. Willet, might have been occasioned by exposure to the air, nor would its coagulation prevent it from being absorbed. Witness could not decide with certainty, even had he performed the

operation himself; whether the death was occasioned by the monachie or by the trepanning. Did not see the patient. Had known a rupture of a blood vessel from extreme passion. Persons of violent temper were liable to apoplexy from a surcharge of blood to the head.

N^W YORK,
Nov. 1823.

~
The People
v.
Ward,

Dr. Valentine Mott, who performed the operation of trepanning the deceased in the hospital, testified that his head was broken, and his death occasioned by the injury, and not by the trepanning. Of this he spoke positively, and with certainty.

The testimony here closed; and the cause was ably summed up by Mr. Anthon and Mr. Price, with the following eloquent speech by Doctor Graham, in defence of the prisoner :

Gentlemen of the Jury :

The Almighty, of his infinite goodness, has given to one man *ten* talents, to another *five* talents, and to a third *one* talent.—If I were to bury *my talent* in the earth, or lock it up on this occasion, I should not only do great injustice to the prisoner at the bar, but should also consider myself as sinning against the bounty of Providence. Therefore, as one of the counsel for the prisoner, I shall now have the honour of addressing you in his behalf.

The prisoner is indicted for the crime of *manslaughter*, in causing the death of Albert Robinson, by giving him a blow on the right side of the head with a stick attached to his cart, commonly called a monachie, on the evening

N^W YORK,
Nov. 1823.

The People
v.
Ward.

of the 17th of October now last; to which charge the prisoner has pleaded *not guilty*, and put himself upon God and you, gentlemen of the jury, for trial.

I congratulate the prisoner and the public, that the constitution and laws have wisely placed in your hands the trial of this cause; knowing, as I do, the character of our New York jurors being proverbial for wisdom and sound discretion—lovers of liberty, humanity, and justice, and generally speaking, men possessing undeviating integrity, and of high and delicate honour.

Having, with great deliberation, examined and considered the law and facts—the principles which ought to govern in this case, and the tribunal which is to *decide* the fate of the prisoner, I have made up my opinion, and fear not the final result. Of the law, as well as of the facts, you are the judges, and I shall draw on you, for my client, your verdict of acquittal. As discreet men, and jurors, you will always pay the greatest deference and respect to what may fall from the lips of a learned judge, especially when it comes from one whose life has been devoted to philosophical and juridical studies; but remember, that the greatest lawyers and the greatest judges often differ in opinion, as much as in their looks, on the subject of *homicide*, which by the books is divided into three kinds: *justifiable*, *excusable*, and *felonious*. I contend, that instead of the prisoner having been guilty of *manslaughter*, as charged in the indictment, the act is *excusable homicide, se defendendo*, or in self defence.

To establish fully my defence for the prisoner, I shall

confine myself principally to the law and the facts, since eloquence is necessary only to defend a bad cause, and a good one may easily be supported by the logic of common sense, and the rhetoric of unstudied expression. Gentlemen, *time*, *place*, and *provocation*, are all important in the investigation; thereon hangs the very *gist* of this indictment; and this case, like all others, must stand or fall on its own merits. The learned counsel associated with me have read to you the law from *Black. Com.*, *Hale's Pleas of the Crown*, *East's Crown Law*, *Lovel's case*, *Harcourt's case*, *Goodwin's case*, and some other authorities which ought to govern in this case. I subscribe fully to the doctrine, by those gentleman so ably, forcibly, and eloquently contended for, whatever may be the opinion of the court to the contrary.

N^W YORK,
Nov. 1823.

~~~~~  
The People  
v.  
Ward.

Let me call your attention to the *two* great laws of human society, from whence *all the rest* derive their course, force, and obligation; they are those of EQUITY and SELF-PRESERVATION; by the first, all men are bound alike not to hurt one another; by the second, all men have a right to defend themselves. The civil law says, "It is a maxim of the law, *that whatever we do in the way, and for the ends of self defence, we may lawfully do.*" This principle of the civil law has been fully recognized in the 5th section of the act, passed the 14th of February, 1787, by our legislature, declaring, that persons *killing in self defence*, or by *misfortune*, shall be thereof fully acquitted and discharged. 1 L. N. Y. p. 67.

All the laws of society are entirely reciprocal, and no man ought to be exempt from their force; and whoever violates this primary law of nature, ought by the law of

N<sup>W</sup> YORK,  
Nov. 1823.

The People

v.  
Ward.

nature to be destroyed. He who observes no law forfeits all title to the protection of law. It is wickedness not to destroy a destroyer, and all the ill consequences of *self defence* are chargeable upon him *only* who occasioned them. To allow a license to any man to do evil, with impunity, is to make vice triumph over virtue, and innocence the prey to the guilty. The law of nature does not only allow us, but obliges us to defend ourselves. It is our duty, not only to ourselves, but to society. If we suffer tamely a lawless attack upon our person, property, and fortunes, we encourage it, and involve others in our doom. And Cicero says, "He who does not resist *mischief* when he may, is guilty of the same crime, as if he had deserted his *parents*, his friends, and his country." So that the conduct of my client, in *defending his person* and *his property* against the unlawfully and wicked attack of the deceased, is, I contend, *excusable homicide in self defence*, by all laws human and divine.

Again; the motive from which an action springs ought never to be overlooked, and it would be against natural justice to condemn a man to punishment for what is owing rather to his *misfortune* than his *fault*. The prisoner could have had no motive but merely to defend himself and his property. The deceased, a *total stranger* to him, seized his horse by the head, and stopped him on the public high road, when my client was in the peace of God, in the peace of the people of the state of New York, and about his lawful business. This is a very important fact, and calls for the most serious consideration; and it ought to be most carefully weighed by every juror on the panel. Suppose either of you, gentlemen, had been

stopped on the high road, just at the dusk of the evening, by a stranger, as was the prisoner by the deceased—your property seized *by force*—your person most grievously insulted and injured, and you had no alternative but to submit to the insult and outrage, or by defending yourself and property against the mischief intended you ; your own good sense, and knowledge of *cause* and *effect*, will instantly give the answer.

NEW YORK,  
Nov. 1823.

The People  
v.  
Ward.

The counsel who preceded me in summing up this cause, having gone minutely into the testimony, I shall not trespass on your time by recapitulating the evidence, as the same must be fresh in your minds. I would ask, then, can you consign to a state's prison, for years, a worthy citizen, who, unfortunately, to save himself and his property from destruction, was driven of necessity to give the blow which has since proved the death of a man whom the prisoner believed, at the time, was a lawless desperado? The prisoner deeply laments the death of the deceased ; but he feels no remorse—no disquieting dread of God or man, because his conscience whispers to him, that what he did on that occasion was only in *self defence*.

The honourable the district attorney, in withholding from the jury the examination of the prisoner taken in the police immediately on his arrest, I must say, notwithstanding my friendship and esteem for that gentleman, does not comport with my ideas of justice and humanity ; and to my mind, it is self-evident Mr. Maxwell intends to press all sail that he possibly can to convict the prisoner. I therefore most earnestly request of you to banish from your ears the charms of his eloquence, and with your

N<sup>W</sup> YORK,  
Nov. 1823.

—  
The People  
v.  
Ward.

oaths upon your consciences, make to this tribunal and your God, your solemn verdict. Gentlemen, in the name of your own interest—your own honour—and your own glory, I call upon you, by your verdict, to pronounce judgment on *yourselves*, because a similar misfortune may some day, by the providence of God, happen to some of you. If the authorities and arguments my learned associates and I have used, have not been convincing, you would not be convinced though one should arise from the dead. Justice and humanity revolt at the idea of a verdict of guilty, against the prisoner; and should you, by your verdict, pronounce the horrible word *guilty*, I should blush over this departure from those characteristic features of moral rectitude in the gentlemen who fill the panel, and tremble at the impending vengeance which awaits your future destiny.

The argument was concluded in behalf of the people, by Mr. Maxwell, the district Attorney, in his usual clear, candid, and impressive manner. An appropriate charge was delivered by the Recorder, in which the prominent facts were recapitulated, and the law relative to manslaughter, and the distinction between it and chance medley in self defence, was stated and explained with great precision and perspicuity. At 9 o'clock it was committed to the jury, who in about two hours returned with a verdict of NOT GUILTY.

GENERAL SESSIONS.

NEW YORK, NOVEMBER, 1823.

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| <p><i>The People</i><br/>vs.<br/><i>John Degey.</i></p> | } | <p>DISTURBING DIVINE SERVICE.</p> |
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Honourable *Richard Riker*, Recorder.

*Hugh Maxwell*, District Attorney.

Messrs. *Scott, Price, and Wilson*, Counsel for the Prisoner.

The defendant was charged in an indictment, in the following words:

"City and County of New York, ss.—The jurors of the people of the state of New York, in and for the body of the city and county of New York, upon their oath present, that John Degey, late of the first ward of the city of New York, in the county of New York aforesaid, labourer, on the 26th day of October, in the year of our Lord one thousand eight hundred and twenty-three, being Sunday, with force and arms, at the eighth ward of the city of New York, in the county of New York aforesaid, in the Ebenezer Baptist Church there, during the celebration of divine service, unlawfully, unjustly, and irreverently did disturb and hinder one Jonathan Vanvelser, then being the minister officiating in the said church, and then being in the discharge of his sacred functions, and in the performance of divine service, in contempt of the laws of this state, to the evil example of all others in the like case offending. and against the peace of the people of the state of New York, and their dignity."

Disturbing  
divine service  
is indictable  
at common  
law, notwith-  
standing the  
statute 1 R. L.  
19. declares  
the penalty,  
and points out  
the remedy.

N<sup>W</sup> YORK,  
Nov. 1823.

The People  
v.  
Degey.

The evidence before the jury appeared to be as follows:

The defendant, in company with a friend, visited the Ebenezer Baptist Church, of which Mr. Vanvelser was pastor, on the      day of      1823, and felt himself displeased at some words uttered by Mr. Vanvelser during the service. He and his friend again visited the church on the following Sunday, and during the service he interrupted Mr. Vanvelser by observing that he had contradicted himself in using language now, against that which he had uttered on the Sunday evening preceding. Mr. Vanvelser replied, that an explanation might be had at another time and place. Defendant answered he might go on if he used decent language.

The counsel for the defendant rested his defence upon several grounds:

1. That it was not indictable at common law. The statute law of our state had provided a remedy which must be followed: that statute (Revised Laws, vol. ii. p. 195.) declares, "That if any person or persons whatsoever, on the first day of the week, called Sunday, or on any other day or time, shall wilfully, and of purpose, disquiet, interrupt, or disturb any assembly of the people met for religious worship, by making a noise, or by rude and indecent behaviour or profane discourse, and shall be thereof legally convicted before any justice of peace of the county, or any mayor, recorder, or alderman of any city where the offence shall be committed, shall, for every such offence, forfeit and pay to the use of the poor a sum not exceeding twenty-five dollars." The statute proceeds, and authorizes, on non-payment of the penalty, a committal of the party to the common gaol, for the period

of thirty days. They contended the only remedy was under this statute; that it must be strictly followed; that the offence as charged in this indictment had been recognized at common law.

N<sup>W</sup> YORK,  
Nov. 1823.

~~~~~  
The People
v.
Degey.

2dly. It was the right, and perhaps was the duty, of those worshipping at a church when doctrines were publicly taught derogatory to christianity, to object, to oppose them publicly in the church; and if done decently, and with decorum, it was not an offence at common law, or under this statute.

Maxwell, District Attorney, replied, that it was clearly an offence at common law. There was a precedent in Chitty in a similar case; that it could not be tolerated for a moment, that the worship of a whole congregation might be interrupted in the manner charged in this indictment, and yet not be punishable at common law. He might have proceeded against the defendant for the penalty under the statute, but he chose the more effective remedy at common law.

2dly. He denied the right of the defendant, or any other person, to obstruct the worship in the manner charged upon the defendant. It was obvious he went to the church with bad motives, and not for the purpose of worship. He was guilty of indecorously disturbing, &c.

His Honour the Recorder observed, that the court was of opinion that this was a good indictment at common law, and could be sustained. That if the law was as contended for by the counsel for the defendant, the important provision in the constitution, which guaran-

N^W YORK,
Nov. 1823.

The People
v.
Degey.

teed the free enjoyment of religious principles and worship to every person, would become nugatory. No man had a right to disturb another in the exercise of that important privilege. If he did, he might be indicted, and, if convicted, suffer a penalty of fine or imprisonment, or both.

By the evidence in this case, it appeared the defendant had disturbed the worshippers in the Ebenezer Baptist Church, by an indecorous controversy with the officiating minister of that church during divine service; the motives of his attendance at the church appeared by the evidence, if not bad, very suspicious: he was not a member, and had no right to interfere at all in the mode and manner of that worship; or, at least, not by disturbing the congregation during service.

The court were, therefore, clearly of opinion that the offence charged in the indictment was an offence at common law, and that the evidence against the defendant fully proved the charges set forth in it.

The jury immediately returned a verdict of GUILTY.

GENERAL SESSIONS.

NEW YORK, NOVEMBER, 1823.

*In the matter of William Hunt, }
Apprentice. } APPEAL.*

The apprentice in this case was bound to John Rogers, appellant, to serve until he should arrive at the age of 16 years, to learn the art, trade and mystery of an equestrian. The apprentice, after serving some time with his master, left him, without his consent. The master applied to the justices of the police, and thereupon the said justices issued a warrant, upon which the said apprentice was apprehended.

Quere, is the business of an equestrian, so far as it relates to apprentices, *contra bonos mores* or not?

The matter being heard before the justices, they discharged the apprentice, upon the ground that the business of an equestrian was not a legal and proper calling. The master appealed to this court, under the statute relating to appeals. 1 R. L. p. 135, s. 13.

J. H. Hedly, Esq., counsel for the master, contended, that inasmuch as the business of an equestrian was not *contra bonos mores*, it was in that respect legal, and also, as the like institutions were licensed in some of the cities of the union, and as it was in contemplation to license them in this city, it was therefore to be inferred that they were acknowledged to be lawful. He cited 3 Vin. Abr. 31. *Dominus Rex v. Gately*, Salk. 471.

The court decided that the prisoner should return to his master until the further order of the court.

NOVEMBER SESSIONS.

READING (PENN.), NOVEMBER, 1823.

The Commonwealth
vs.
John K. Boyer, Jacob W. Seitzinger,
Jacob K. Boyer, Frederick Shebely,
and Henry Zeller.

} CONSPIRACY.

Present—The *Honorable Robert Porter, Esq.*

Daniel J. Hicster, Frederick Smith, David Paul Brown,
and Alexander L. Hayes, Esquires, Counsel for the
Prosecution.

Marks Jno. Biddle, Charles Evans, James Buchanan,
Samuel Baird, James B. Hubley, and William Dar-
ling, Esquires, Counsel for the Defendants.

This interesting case was called up on the 5th inst., when it appeared that all the defendants except Henry Zeller had pleaded "not guilty;" and he being requested to plead, this was objected to by Evans and Buchanan; it appearing on the face of the record that he had been examined before the grand jury, as a witness; and further proof being offered, that he was inveigled to appear in that character by the prosecution, who promised that no indictment had been or should be preferred against him.

In support of this objection, it was contended, that as the constitution had expressly forbidden the use of force

in such cases, courts of justice should never allow the substitution of fraud to be effectual.

READING,
Nov. 1823.

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The Com'th  
v.  
Boyer and  
others.

Brown, contra, et per Cur. "The Attorney General has required Henry Zeller to plead to the indictment; and it is not necessary for us to go into an examination of circumstances; for if fully made out, we should not consider the case strong enough to support the objection."

The defendant pleaded "not guilty"; and the counsel for defendant intimated their intention of severing in their challenges, which was overruled by the court without argument, a minute of such decision being entered on the record.

The material part of the indictment stated, "that (*the defendants above named*) at the county (*of Berks*) aforesaid, being evil disposed persons, and wickedly and unjustly devising and intending to defraud and prejudice certain persons hereinafter mentioned, on the first day of May, in the year of our Lord 1823, with force and arms, *at the county aforesaid*, did falsely, fraudently, and unlawfully conspire, combine, and confederate, and agree among themselves to *obtain, acquire, and get into their hands and possession*, of and from a certain firm of Hood, Irvine & Company, a certain firm of Hubbs and Evans, a certain firm of C. S. & T. W. Smith, a certain Richard S. Risley, a certain firm of Stevenson & Hart, and a certain William Rogers, Jr., divers large amounts of goods, wares, and merchandizes, and the jurors aforesaid, on their, &c., do present that the said, &c., in pursuance of, and according to, the said conspiracy, combination, confederacy and agreement among themselves, had as

Form of the  
indictment.

READING,  
Nov. 1823.

The Com'th  
v.  
Boyer and  
others.

aforesaid, *then and there* did falsely, fraudulently and unlawfully obtain, acquire and get possession of divers large amounts of goods, wares, and merchandizes, of and from the said, &c., to the great damage of the said, &c., to the evil example of all others, and against the peace and dignity of the commonwealth of Pennsylvania.

"And the jurors aforesaid, on their, &c., do further present, that the said, &c., being such persons as aforesaid, and wickedly and unjustly devising and intending to defraud certain merchants and traders of the city of Philadelphia, of large amounts of goods, wares, and merchandize, on the same day and year aforesaid, with force and arms, at the county aforesaid, did falsely, fraudulently and unlawfully conspire, combine, confederate and agree among themselves *to obtain, acquire and get into their possession*, of and from the said merchants and traders, divers large amounts of goods, wares, and merchandize, to the great damage of the said merchants and traders, and against the peace and dignity of the commonwealth of Pennsylvania."

The case was clearly and handsomely opened to the jury by Hayes, for the prosecution; who stated that the conspiracy would be fully proved by a correspondence in writing between the parties, and by their own declarations and other parol testimony; and that it was carried into execution by Henry Zeller's being sent down to Philadelphia with letters of credit, enabling him to purchase goods to a large amount; which goods were afterwards carried away and concealed.

To substantiate this, several letters were offered in evi-

dence, from one or two of the defendants, relating chiefly to the purchase of merchandize, but without containing any direct proof of a conspiracy or other criminal matter. This course was objected to by Evans, who contended that before particular acts could be inquired into, a general conspiracy or combination must be proved,\* and cited Phillips, 73; and Hubley, on the same side, argued that five persons might be guilty of as many conspiracies as the abstract numbers were capable of separate combinations, and therefore that the act of a solitary individual ought not to be brought forward to implicate four others, unless that act was first deduced as the act of all, &c.; and cited 1 Chitty, 88, 3 S. & R. 16. Buchanan and Evans, to the same point, cited 3 Chitty, 570, 3 Serg't & R. 224, 3 Chit. 951; and also intimated their inten-

READING,  
Nov. 1823.

The Com'th  
v.  
Boyer and  
others.

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\* This point has been decided in a case in the court of Sessions in New York, in November Term, 1823. James Stamford was indicted for an assault on Mary Robinson, with intent to commit a rape. Mary Robinson was offered as a witness to prove the felony, but was objected to on account of her infancy.

Maxwell, District Attorney, called witnesses to prove the injury upon the body of the infant. Blake, counsel for the prisoner, objected, and contended that the proper course was for the District Attorney to show that the *prisoner* had committed the injury, *before* he went on to show the particulars; for possibly, after he had shown them, he would not be able to prove them upon the prisoner.

The Court observed, that it had been decided, that the District Attorney might begin at any part of the case: if he chose to introduce witnesses to prove the felony and the particulars of it, *before* he proved the *prisoner* committed it, it was legal and proper, and if he was unable to connect the prisoner with the crime, it would go for nothing.

READING,  
Nov. 1823.

The Com'th

v.

Boyer and  
others.

present action, and that it was altogether irrelevant, and that if one individual could implicate another, by calling and requesting him to frame a letter on an entirely innocent subject, the most virtuous and honorable man in society would not be free from such accusations.

Brown and Hayes, contra, contended that the objection of the letter's being written to a person not party to the suit, was groundless, as it might fairly be read to show the intention of the writer.

In answer, it was urged that in every indictment the probata must agree with the allegata, otherwise the whole would be a nullity; that by a recurrence to the present case, the charge was for getting and obtaining goods, an act perfectly innocent in itself; and that to render criminal an act *prima facie* innocent, a sufficient ground of inducement should be shown; that the law was well settled, and that although a previous conspiracy might be shown by subsequent acts, yet that subsequent act must be a criminal one, or have some bearing upon the charge; sed per Cur. :

"The charge of conspiracy must be established by proving certain acts which occurred previous, subsequent, or while it was carrying on. The witness has stated certain acts, one of which is the writing of this letter; it strikes me, therefore, it ought to go to the jury; if not relevant, the objection can be made to them."

A letter was then offered in evidence, which was objected to, as containing testimony of a secondary nature, and Hubley stated, that he felt confident the court would

be anxious to hear all proper evidence; but there was a line, beyond which he was sure it would not go; that the principal part of the letter offered related to a person who did not write it, did not see it, and perhaps knew nothing whatever of the thing; and that no particular facts, not in themselves illegal, should be gone into before a combination of some kind had been proved.

READING,  
Nov. 1893.

The Com'th  
v.  
Boyer and  
others.

On this subject, Baird cited M'Nally, 614; and Buchanan briefly observed, that he considered it not a question of evidence, but whether a court of this country had a right to dispense with the law of the land; that the letter tended to prove overt acts not laid in the indictment, and that its admission was contrary to settled principles. The argument was enforced by Evans, who cited Chitty, 951.

Brown, contra, contended against the recognition of principles as deduced by the opposite counsel, and cited Tomlin's Index, 48, Archbold, 62, 268, and was about to proceed, when the court intimated it to be unnecessary. Et per Cur.:

"I consider it settled in Pennsylvania, that in conspiracies, after proper foundation has been laid, secondary evidence may be introduced, even in facts in furtherance of the charge, though not laid in the indictment; and the court is to say whether such foundation has or has not been laid; and it does appear to the court that such foundation has been laid."

The prosecution then called David Moser, who, it appeared, had acted as the porter of Henry Zeller, and re-

READING,  
Nov. 1823.

The Com'th  
v.  
Boyer and  
others.

ceived goods for him from sundry merchants of the city of Philadelphia. He was objected to; and Evans observed, that as the overt act was laid in the county of Berks, the prosecution was precluded from proving a delivery or receipt in the county of Philadelphia.

Hayes, contra, contended that in the case of conspiracy this strictness was not necessary, and cited Tomlin's Index, 48. The further argument of this point was deferred until the next morning, when Evans again objected to the witness being heard, and, in order to give a short view of the ground upon which he founded his objection, proposed to state the principles, precedents and authorities from which it was drawn; and, after recurring to the indictment, stated that the only question before the court was, whether, when the overt act had been laid in the county of Berks, evidence could be given of an overt act committed in the city of Philadelphia? He contended that on principles of analogy this testimony was inadmissible; that in all indictments, great and small, the certainties of time and place were indispensable. 1st. To enable the party accused to know how to prepare his defence; and, 2d. That he may plead in bar or abatement to a subsequent indictment for the same offence. That with regard to conspiracies in Pennsylvania, this was strongly the case, and the "*adhunc et ibidem*," the time and place, must be fully and clearly laid down. Here, however, the court intimating that a determination had been formed which would remain unshaken, he was induced to shorten his argument; and the witness was heard.

Hood Irvine was then called up, and stated, that after the failure of Henry Zeller, and development of some sus-

picious circumstances, he went to his brother's house, found him lying on the bed, and immediately calling for pen, ink and paper, took down what he termed "a confession."

READING,  
Nov. 1823.

~~~~~  
The Com'th
v.
Boyer and
others.

He however admitted, that he had only minuted such parts as to him seemed material; and it also rather appeared, that some kind of inducement had been exerted over Zeller's mind to influence him to make the confession.

To the admission of this paper, or to the parol recollections of Hood Irvine, the counsel for the defendants strongly objected; and Evans contended that of all kinds of evidence confession was the worst; that it was a principle of law, that no confession could be read, unless obtained with the unbiassed consent and free will of him from whom it was taken; and that even then it was not evidence unless the whole of the party's declarations at the time had been reduced to writing; and cited Philips' Evidence, 82.

Darling also cited Chitty's Criminal Law, 68., which he deemed decisive.

The recollections of Hood Irvine were objected to by Buchanan, who contended that if a written confession is in being, or even has been taken and lost, no parol proof of the contents of that confession, or of the party's declaration, can be afterwards received.

Hayes, contra, admitting the law, argued, that it did not apply; that as to promises or persuasion, if any had been used, they were not communicated to Zeller, until after he had fully disclosed himself; and that all that

READING,
Nov. 1823.

The Com'th
v.
Boyer and
others.

was necessary was for Hood Irvine to take down the essential parts of his confession. Sed per Cur:

"It has been the practice in Pennsylvania for a justice of the peace to take, judicially, the confession of a prisoner; and such confession, having the other requisites, may always be read in evidence; but I do not think that a private individual has authority, or that it would be advisable to allow them the privilege, to take the confession of a person charged with the commission of an offence; and moreover, there does appear that some kind of influence had been exerted over Zeller's mind; I therefore cannot allow any part of this matter to go to the jury."

Subsequent to this, William B. Emerick was called, and about to state, that John K. Boyer, in his hearing, declared, that one other of the defendants had proposed a plan to defraud, similar to the one afterwards carried into execution; but this was objected to, and the court requested the counsel for the prosecution to cite the authority which induced them to insist upon the examination of the witness. 6 City Hall Recorder 43. and Archbold, 68., were given by Brown as the authorities upon which he rested.

Buchanan, after admitting, for a moment, that Hunt's trial, alluded to by the Recorder, even under the circumstances with which it was accompanied, could be read as authority, still contended that it did not bear upon the present case; and was entering fully on the argument, when the court informed him the question was plain, and that the evidence could not be received.

Several other minor points were agitated and argued, but none important enough to claim particularly notice;

and on the 8th inst. the case on the part of the prosecution was closed.

READING,
Nov. 1893.

The Com'th
v.
Boyer and
others.

The defence was opened by Hubley, who stated that he had hoped, after all that had passed, the prosecution, as to some of the individuals, would have been withdrawn; that in fact the prosecutors were the conspirators; that he would show that several of the defendants, at the time of the alleged conspiracy, were at enmity, and that the whole were perfectly innocent of the charge.

The case then proceeded rapidly towards a conclusion; but before it terminated, and in the course of the examination of Mr. Hubbs, the defendants' counsel attempted to ask him questions rather tending to impeach his credibility, which was objected to on the ground of his being their own witness; that was denied; and although the witness was subpoenaed and subsequently attached by the defendants, yet Buchanan contended that as the plaintiffs had called and examined him first, they had therefore adopted him, and had made him their own witness; and so the court decided, ordering the witness to answer.

On the 10th, the defence, which consisted chiefly of rebutting and explaining testimony, was closed, and the case opened to the jury by Hayes.

Biddle and Buchanan then summed up for the defendants, and the whole was closed by Brown for the prosecution. A lucid and learned charge was given by his Honour the President of the court, when the jury retired, and after an absence of about 12 hours returned with a verdict of NOT GUILTY; and the defendants were sentenced to pay the costs of the prosecution.

GENERAL SESSIONS.

NEW YORK, NOVEMBER, 1823.

<i>The People</i> vs. <i>James Stamford.</i>	}	ASSAULT, WITH INTENT TO COMMIT A RAPE.
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Construction
 of stat. 13
 Eliz. c. 7.

The prisoner was indicted for an assault upon Eliza Morrison, an infant of about seven years of age, with an intent to commit a rape.

The injury upon the body of Eliza was proved by the testimony of an old lady who resided in the house where the crime was perpetrated. She being but seven years of age, and not appearing to understand the nature of an oath, was not sworn. It was therefore uncertain whether the act was committed with or without her consent.

Blake, counsel for the prisoner, contended, that at common law, force was necessary to the commission of a rape, above or under ten years of age. The statute 18 Eliz. c. 7. had made an alteration in the common law ; by that statute, and the act of assembly of New York, carnal knowledge of an infant, with or without consent, was felony. But neither the statute of Eliz. or the act of assembly of New York, (1 R. L. 156.) extended to cases of an *attempt* to commit a rape, and that where it was doubtful whether the attempt was with the consent of the sufferer or not, it was the duty of the jury to acquit.

The court after remarking upon the atrocious nature of offences of this kind when committed upon children who were ignorant of the consequences, observed that the rule of law contended for by the counsel was undoubtedly true. The statute of Eliz. and the act of assembly of New York had made an innovation in the common law; formerly force was necessary in the commission of a rape in all cases; now, by the statute above mentioned, carnal knowledge of an infant under ten years of age was felony, whether she consented or not. It was obvious the statute did not apply to an attempt to commit a rape, it was therefore as at common law; but that it was almost impossible to suppose consent from an infant of seven years of age; that the act was obviously against her will, and that the presumption of law was so strong as to amount to proof of force.

N^W YORK
Nov. 1823.
The People
v.
Stamford.

The jury found him guilty of an assault with intent to commit a rape; he was sentenced to the state prison for the term of five years.

OYER AND TERMINER.

MILLEDGVILLE, (GEO.) OCTOBER, 1823.

<i>The State</i>	}	MURDER.
vs.		
<i>John M. Williams.</i>		

Messrs. *King, Rockwell, Cuthbert, and Sparks*, Counsel for the state.

Messrs. *Strong, Holt, and Saffold*, Counsel for the Prisoner.

MILLEDGE-
VILLE,
October, 1823.

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The State
v.
Williams.

This was an indictment in Jones Superior Court, at the October Term, 1823, against the prisoner, John M. Williams, for the murder of his wife; and such was the extraordinary excitement produced on the public mind by the unparalleled cruelty and depravity which marked the features of this transaction, that it was not until three full panels of forty eight jurors each, had been successively summoned and tendered to the prisoner, that a *Jury, omni exceptionis majoris*, were sworn.

It appeared, that on the 14th day of May last, the brother in law of the prisoner, and his wife, (who was the sister of the prisoner's wife) were on a visit at the prisoner's house, six or seven miles from Clinton. A fishing excursion was proposed and agreed to, upon which the prisoner and his brother in law were absent from the house until about six o'clock in the evening, at which time they returned. Dinner being immediately prepared for them, they sat down apparently in fine humour. While sitting at the table, an infant child of the prisoner, then only nine days old, cried, and Mrs. Williams, its mother, rose and took it up; when the prisoner inquired, "Mary, whose child is that?" She made him no answer. He repeated the inquiry, and she answered, smiling, "Mr. Williams, you know whose it is." The prisoner immediately became enraged, and burst forth into a strain of bitter and indelicate abuse. Upon this the brother in law interposed, and threatened to chastise him for his conduct; but in consequence of the entreaties of the prisoner's wife, he desisted. Shortly after this scene, the brother in law and his wife departed for their residence in Clinton, the prisoner having apparently become calm, and acknowledged his error: but upon his sister in law taking leave of him, and offering him her

hand, he observed, she need not shake hands with him, but "*bid her sister farewell.*" These words, though ominous, were not at that time particularly regarded by them, and they departed. About the distance of a mile from the prisoner's house, they met a Mr. Gibson, and being apprehensive that the prisoner's anger might return after they left the house, and that he might, in the unprotected state of his wife, whip her, or do her some other injury, they requested him (Mr. Gibson) to ride on as fast as possible to the prisoner's house, and to quiet any angry feelings that might remain, commence a conversation with him on the subject of his election—the prisoner having shortly before announced himself as a candidate for a justice of the peace.—When Gibson arrived within one fourth of a mile of the prisoner's house, he heard the shrieks of a female apparently in great distress. He hastened to the spot, and then a spectacle was presented to his view that for misery and horror beggars all description. About twenty or thirty yards from the house he found the prisoner's wife stretched upon the ground, her head almost severed from her body, there remaining not more than one and a half inches of skin on the back part of her neck, her hair thrown back, and clotted with gore, and in other respects most dreadfully mangled, and the prisoner standing within five or six feet of her with a razor in his hand, attempting to cut his own throat. Mr. Gibson, on his arrival found that a Mr. Bazemore and a Mrs. Roquemore had reached there before him. Mrs. Roquemore stated in her testimony, that she was returning home from Mr. Bazemore's, who lived within less than one fourth of a mile of the prisoner, with an intention of calling on Mrs. Williams, (the prisoner's wife,) when she was informed that the pris-

MILLEDGE-
VILLE,
October, 1823.

The State
v.
Williams.

MILLEDGE- oner was killing his wife. She hurried on as quick as
 VILLE, possible, and went immediately into the prisoner's house,
 October 1823. where she found no person but the infant child, screaming
 most piteously on the bed. She took it up, and found lay-
 ing on the floor a lady's cap with the strings cut, and a cap
 torn in two, and many marks of blood in the room. She
 heard a noise in the field, and went to the spot from whence
 it proceeded, and found the prisoner and his wife in the
 situation described by Gibson. Mr. Bazemore testified,
 that he had on that day been in company with the pris-
 oner and his brother in law at the river in their fishing
 excursion. They left him, and in the evening he passed
 by the house of the prisoner on his way home. When
 passing by, he supposed that both the prisoner and his
 brother in law were at the house. He went home, a dis-
 tance of something less than one fourth of a mile from
 the prisoner's house, and there found Mrs. Roquemore in
 the act of setting out home. He immediately sat down to
 dinner, and before he had finished eating he was informed
 that the prisoner was killing his wife. He sprang from
 the table, and ran over to the house of the prisoner, and
 when he reached the yard gate, he saw Mrs. Roque-
 more running out greatly distressed, with the prisoner's
 infant in her arms. At some distance off he saw the pris-
 oner standing with a razor in his right hand, attempting
 to cut his own throat, and with his left hand beckoning
 to him (the witness) as if he wished him to approach.—
 He went immediately to him, and found Mrs. Williams
 as described by Gibson, with the blood yet flowing from
 the wound.—He exclaimed, "look Williams! see what
 you have done!" upon which the prisoner pointed to the
 corpse of his wife, and groaned hideously. Bazemore
 then wrested the razor from him, and Gibson, who ar-

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 The State
 v.
 Williams.

rived at the same moment, assisted him in carrying the prisoner to the house. In the room of the house, behind a trunk in which the prisoner kept his razor, was found a two bladed pocket knife, open and bloody, and upon the lid of the trunk, the print of a man's bloody hand. The knife was proved to be the prisoner's.

MILLEDGE-
VILLE,
October, 1823.
The State
v.
Williams.

From the testimony of other witnesses, and particularly the ladies who shrouded the deceased, it appeared that many other severe wounds had been inflicted; one on the back of the head which reduced the part to a jelly, as if with a stick, a large perforation in the temple, and one or two in her breasts, apparently produced by stabs with a pocket knife.

It appeared from the testimony that the prisoner and his wife had been married between five and six years; that she was the mother of four children; that she was young, lovely, amiable, and affectionate, and at the time of her marriage possessed a fortune sufficient to insure, under discreet management, a handsome competence; that he was gay, likely, and possessed a good understanding; but that under all these circumstances their matrimonial felicity was very incomplete. From a strange perversity of disposition on his part, he had frequently treated her most cruelly. She had several times exhibited marks of the most inhuman violence; but such was the kindness of her disposition, and the meek forbearance of her nature, upon the smallest expression of his regret for his cruel and unmanly conduct, he was always sure of her forgiveness, and a quick return of her warmest affection. When his injurious conduct was confined to ungenerous and abusive upbraidings, she never murmured or resisted;

MILLEDGE- and when his headlike disposition led him to extend it to
VILLÉ, blows, she implored his mercy.
October, 1823.

The State
v.
Williams.

It was attempted, on the part of the counsel for the prisoner, to prove insanity: but they totally failed, all their witnesses proving that he was a man of strong and vigorous intellect. They then rested the defence, and in their arguments contended for an acquittal upon two grounds: first, the danger of convicting upon circumstantial evidence. Under this head they ingeniously tried to convince the jury that a possibility existed of the deceased having committed self murder. 2dly, They contended and urged, with a zeal deserving a better cause, that if the prisoner did commit the murder, the circumstances attending it were so horrible in themselves as to prove conclusively that he must have been in a state of mental derangement; that no human being possessing the full use of his reason could conceive, much less execute, an act of such dreadful atrocity. At 11 o'clock at night, the trial having occupied the whole of the two preceding days, the argument closed, and the judge having, in an impartial and impressive manner, instructed the jury in all the points of law which could be possibly involved in the case, they retired to their room, and in five minutes returned into court, and amidst the apparent stillness of death, pronounced a verdict of GUILTY.

GENERAL SESSIONS.

NEW YORK, NOVEMBER, 1823.

<p><i>The People</i> vs. <i>Noah Pomeroy.</i></p>	}	COUNTERFEIT NOTES.
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Maxwell, District Attorney, counsel for the people.

Messrs. *Price* and *McEwen*, counsel for the prisoner.

Noah Pomeroy was tried upon an indictment containing four counts, for having in his possession certain forged and counterfeit bank bills, with intent to pass the same, and also for having uttered them, knowing them to be forged. It came out in testimony, that the police of our city despatched two of their officers, Messrs. Hays, senior, and Homans, in pursuit of the prisoner on the evening of the 13th of October. They found him in Harman-street; and as they seized him, they distinctly saw him, by the light of the moon, drop from his hand a paper, which he attempted to tread upon, containing four counterfeit bank bills of the Eagle Bank in New Haven, which were set forth in the indictment. No evidence was offered of any attempt on the part of the prisoner to utter the bills in question, and the counts which related to his having them in possession, with intent to pass, constituted the only issue; and for proof of this the District Attorney rested upon the testimony of Messrs. Hays and Homans.

Messrs. *Price* and *McEwen*, of counsel for the prisoner, took an exception to the indictment, on the ground that the bills therein set forth were charged to be forged and counterfeit, with intent to defraud the President, Directors and Company of the Eagle Bank. The bills

N^W YORK,
Nov. 1823.

The People
v.
Pomeroy.

produced in evidence were imitations of the bills issued in the name of "the President, Directors and Company of the Eagle Bank *in the city of New Haven*." A Bank is a body politic, and can be known only by its corporate name; any thing more or less than its baptismal description contained in its charter is a defect which no testimony nor averment can supply. The words, "in the city of New Haven," being therefore a part of its corporate name, were essential in the indictment, and their omission was fatal: There might be other banks in the United States by the name of the Eagle Bank, and if this were the only necessary description, the indictment might aim at one set of bills, and the testimony might support it by proof of another. To lay the act complained of with an intent to defraud persons unknown, would be good; but to lay it with intent to defraud a body corporate, designated by a name unknown to the statute which created it, was a course unauthorized either by principle or precedent.

Mr. Maxwell, District Attorney, contended, that if the indictment was laid with a certainty which in legal parlance is denominated "certainty to a common intent," it was sufficient. The gravamen of the case was not the rights acquired by the bank under their charter, but the fraud practised upon the public by the prisoner at the bar. If the rights or duties of the bank were specifically at issue, the objection might be good, but here the great point was whether the individual named had been guilty of the crime which it was the intention of the statute to guard against and punish.

The Court reserved the question as raised by the counsel; but the jury, on the facts disclosed in evidence, returned a verdict of GUILTY.

GENERAL SESSIONS.

NEW YORK, DECEMBER, 1823.

The People }
vs. } FALSE PRETENCES.
James Dalton. }

The defendant was tried at the last term, on an indictment alleging that he obtained from one Hammelin three tubs of butter by a fraudulent pretence. The pretence set forth in the indictment was as follows, to wit, "that he was a grocer, residing at No. 77 Chatham street." This was negatived by the following averment: "that he, the said James Dalton, was not at the time mentioned a grocer, residing at No. 77 Chatham street, nor at any other place in the city of New York."

Where the defendant falsely stated that he was a grocer, and that he resided at a particular place, held a false pretence under the statute, and not a mere naked *falschood*.

On the trial, Hammelin testified, that on the 29th day of October last, Dalton, with whom he had previously no acquaintance, came on board a vessel which he commanded, and which was then lying at some wharf in the city, and purchased a tub of butter, stating that he was a grocer, residing or doing business at No. 77 Chatham street. He did not pay for it at that time, but said he would do so when he returned the tub. Hammelin tes-

The question whether a pretence was such an one as might have been guarded against by ordinary prudence, is a question exclusively for

the jury; except where it is manifestly such an one as could not, by possibility, deceive a man of common sagacity; in which latter case (semb.) the court will arrest the judgment.

The false pretence set forth in the indictment must be the *sole inducement* to the parting with the goods. If it appears that any *act or declaration of the prisoner*, forming part of the *res gesta*, and not set out in the indictment, formed part of the inducement, the prisoner is entitled to an acquittal. Mere accidental circumstances, however, not forming part of the *res gesta*, need not be set forth.

NEW YORK,
Dec. 1823.

The People
v.
Dalton.

tified farther, that it was customary amongst masters of vessels to trust grocers residing in the city, and that he accordingly, without hesitation, permitted Dalton to take away the butter, relying on his promise for payment. Faithful to this promise, Dalton returned the tub, paid for the butter, and stated, that as it was good he would take three tubs more. Hammelin assented to this; but the prisoner did not again make his appearance. A few days afterwards Hammelin discovered that his whole story was false, and that no such person resided at 77 Chatham street. The witness farther stated that he should not have trusted Dalton had it not been for his representation as to his place of residence and his occupation.

Francis A. Blake, of counsel for the prisoner, inquired of the witness whether he had not been prepossessed in favor of the prisoner by his apparent honesty in fulfilling the promise he had made on his first purchase. The witness answered in the affirmative, and admitted, in reply to other questions to the same point, that he should not have parted with the butter last purchased, had not Dalton bought and paid for the former quantity. This, he said, he regarded as a cunning device.

Blake, for the prisoner.—There can be no dispute with regard to the facts in this case. I have not the slightest disposition to vindicate the moral honesty of the prisoner, but I do believe he is in point of law entitled to an acquittal. The questions we shall raise, however, will be addressed entirely to the consideration of the court.

Here his honor the Recorder observed, that the court at present entertained an impression that the prisoner, on the whole case, should be convicted; but that, as some

confusion existed amongst the authorities, it would perhaps be advisable, in order to settle the law, to suffer a verdict to pass by consent against the defendant, reserving the case for the opinion of the court.

N^W YORK,
Dec. 1893.
The People
v.
Dalton.

Blake stated that he should not object to the course proposed, provided it were fairly understood that the prisoner's counsel should not, owing to consent, be confined after verdict to a mere motion in arrest of judgment founded on the record; but that the whole law arising on the evidence should be open for discussion on the argument of that motion. This was acceded to; and at the present term a motion was made in arrest of judgment, or for a new trial in the alternative.

F. A. Blake, for the prisoner.—It will not be contended, I presume, by the counsel for the people, that this case would have afforded good ground for an indictment either at common law or under the statute, 33 Hen. VIII. c. 1. Dismissing at once, then, the numerous cases which were adjudicated prior to the enactment of the statute, 30 Geo. II. c. 24, let us see how far this prosecution can be sustained under that statute and under our own.

By the 18th sec. of the statute (1 N. R. L. 410) it is enacted, that "every person who shall hereafter be convicted of knowingly and designedly, by false pretence, obtaining from any other person any money, goods, or chattels, or other effects, with intent to cheat or defraud any person, &c., shall be punished by fine and imprisonment, or either," &c.

I contend that the indictment, in the present instance, does not set forth a sufficient false pretence within the statute, on two grounds: first, the charge against Dalton consists in the uttering of a *mere naked falsehood*, whereby he obtained the goods from Hammelin on the faith of

N^W YORK,
Dec. 1823.

The People
v.
Dalton.

his own assertion only, and his own personal responsibility, without borrowing credit by using the name of *any other person whatever* ; in which case, I say, no indictment will lie. Again; I shall insist that the pretence set forth in the indictment is such an one as might have been guarded against by the exercise of ordinary prudence on the part of the seller ; that, by failing to exercise such prudence, he has been guilty of a culpable neglect—of such laches as destroys his right of resorting to this tribunal ; and that whether this is apparent on the face of the indictment or not, is a question of *law*, proper for the consideration of the court on a motion in arrest of judgment.

Should the opinion of the court be against the prisoner on these two points, and should it be decided that sufficient appears on the record to authorize a judgment, I shall still contend that a fact was disclosed in evidence *dehors* the indictment, which rendered it the peremptory duty of the jury to acquit, and that we are therefore entitled to a new trial. It appeared from the testimony of Hammelin, that he parted with his goods, not *solely* on the pretence set forth in the indictment, but owing to that pretence conjoined with the fact of Dalton's having purchased a quantity of butter of him previously, and having paid for it according to his promise, whereby Hammelin had been inspired with confidence in his honesty. I hold it to be true in principle, as well as settled by authority, that the false pretence alleged must be the *sole* inducement to credit ; and that whenever another motive appears to have operated on the mind of the seller, the case does not come within the provisions of the statute.

Having briefly stated the grounds on which I shall rely in this defence, I would beg leave, once for all, to express

my own views and opinions with regard to the morality of the transaction. I do not mean to offer a single suggestion in favor of the honesty of the prisoner, or to attempt for one moment a vindication of his character. If the principles of criminal jurisprudence could with propriety be extended to the punishment of every dereliction from social duty, I should not at the present time appear before this court in his defence. It is not, perhaps, to be regretted that he has already suffered an imprisonment of considerable duration, while this prosecution has been pending. While I admit, however, the moral turpitude of his conduct, I would remark that his offence belongs, in my opinion, to a class of cases which human legislation cannot with safety embrace. Treason, murder and robbery are well-defined public wrongs, and may well be punished by human laws. Falsehood, ingratitude, and numerous instances of the most disgraceful violations of confidence and trust are also *crimes*; but they are crimes for which the perpetrator is, necessarily, amenable only to his conscience and to his God.

These remarks, I conceive, are applicable, in their fullest extent, to the offence with which the prisoner stands charged in the indictment now under consideration. It is impossible to distinguish this from any other case in which a man obtains goods *on his own responsibility*, by means of a mere *untruth*. This has been repeatedly held insufficient; but, before I proceed to cite or comment on adjudged cases, let us for a moment consider the point as it regards principle, and see what would be the consequence of a recognition of the opposite doctrine.

J. S., in order to obtain a loan of money, represents himself to be perfectly solvent, and that the amount of his estate much exceeds his just debts. His pretence is

NEW YORK,
Dec. 1823.

~~~~~  
The People  
v.  
Dalton.

N<sup>W</sup> YORK,  
Dec. 1823.

The People  
v.  
Dalton.

successful, and he accomplishes his object. It afterwards appears conclusively, that this is an intentional and impudent falsehood. Would an indictment lie against J. S. on the statute in question? I trust it would not.—T. N. obtains goods on credit, by displaying a list of his debtors; amongst whom he enumerates divers persons as indebted to him in a large amount, and states them all to be persons of responsibility and credit. It is proved, that at the time of the representation, not one of those persons was solvent, and that this fact must have been known to T. N. when he made it. Here, too, is a gross falsehood; yet I presume it will not be contended that T. N. is therefore indictable. Nevertheless, each of these false representations "*relates to an existing fact.*"—They are not "representations as to what will or will not happen." If, therefore, no indictment could in either instance be sustained, I would, with much deference to the opinion of the learned judge who presided at the decision of the case of James Conger, (4 C. H. R. 68.) suggest, that the first distinction taken in that case extends the principle farther than expediency, public policy, or authority will warrant.\*

Innumerable instances daily occur, (and that too amongst men who sustain a high reputation, both in the mercantile world and in society at large,) in which credit is obtained by means altogether inconsistent with

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\* In the case alluded to, (4 C. H. R. 68.) his honour the Mayor, in pronouncing the opinion of the court, says, "A false pretence must relate to an existing fact. Any representation as to what will or will not happen, cannot, in our opinion, be considered as a false pretence. This marks the distinction between a false promise or a false representation, and a false pretence within the statute."

honorab!e principle and strict integrity, and where *falsehood* forms the principal ingredient in the fraud. It is to be regretted that human justice cannot, consistently with sound policy, reach such cases. If this were attempted, however, so numerous would be the accusations presented for the adjudication of courts of criminal jurisdiction—so infinitely various would be the circumstances and complexions of those cases—so uncertain would be the landmarks of the law—that it would become totally impossible to establish any general rules on the subject of frauds.

Aware of this difficulty, courts have been compelled to adopt the following as a general principle: "Where a man makes use of a false token, or any deceit or artifice calculated to gain credit *beyond his own assertion*, or his act predicated on *his own responsibility*, and by such means obtains money or goods, this offence falls within the statute, and the defendant is liable to its penalty." (George Lynch's case, 1 C. H. R. 139.) This I conceive to be the true limitation of the rule; and I do not think it necessary to resort to a single argument to show that the pretence laid in the indictment does not come within it.

The same principle decided in Lynch's case is recognised in Cromwell and Field's case, (3 C. H. R. 38.) and in Dinah Perry's case. (1 C. H. R. 164.) In the case last mentioned it appeared, "that the prisoner came to the shop of one George Lee, in Greenwich-street, and called for a pair of moroccò shoes, stating that she lived with Mrs. Newton, who resided but a short distance from Lee; and that if he would suffer her to take the shoes, she would carry them to her mistress, and if they

NEW YORK,  
Dec. 1823.

The People  
v.  
Dalton.

- N<sup>W</sup> YORK, suited, she, the prisoner, would return the money ; otherwise the shoes.  
Dec. 1823.

~~~~~  
The People
v.
Dalton.

"The prisoner not returning, Lee went in pursuit, and found the prisoner did not live with Mrs. Newton, but had embarked on board a sloop to go up the North River, and he took the shoes from her possession.

"His honor the mayor charged the jury, that the offence of obtaining goods by false pretences under the statute, was not supported by the testimony in this case. This was not a false representation against which ordinary prudence could not guard. Had the prisoner made use of any artifice or circumvention whereby she had obtained the goods on the credit of Mrs. Newton, then her offence would have been within the statute ; but according to the testimony it appeared, that by a resort to a falsehood merely, the prisoner obtained the property on her own credit."

The court concluded by stating to the jury, that a conviction would furnish a dangerous precedent ; and an immediate acquittal was the result.

Now, I would beg leave to suggest, that if the decision in the case last cited be law, and if it be true that the defendant by representing that she lived with Mrs. Newton, and was her servant, was not guilty of such a "fraud and circumvention" as would bring her case within the statute, but "of a falsehood merely," then James Dalton, the defendant, does not appear, from the allegations of the indictment, to have committed an offence cognizable in this court.

In Dinah Perry's case, the defendant stated that she lived with Mrs. Newton, and that Mrs. Newton was her mistress. It appears on the face of the indictment under consideration, that Dalton represented himself to re-

side at No. 77 Chatham-street, and that he was a grocer. Here is in each instance *a falsehood as to residence and occupation*. These falsehoods were in each case the means of obtaining credit, and they are, therefore, parallel.

N^W YORK,
Dec. 1823.
The People
v.
Dalton.

If Dinah Perry had procured the goods under a representation that she had been sent by her mistress for them, the charge against her would have been sustained. So would it have been in the present instance, if James Dalton, the defendant, had represented that he was the agent of a grocer transacting business at No. 77 Chatham-street, and that he had sent him for the butter.

In either of the cases supposed, the defendants would have been, respectively, guilty of "*making use of a deceit calculated to gain credit beyond their own assertion, or their acts predicated on their own responsibility,*" which we conceive to be the gist of the offence.

We trust this distinction, which we believe to be a sound one, has been sufficiently enforced, both on principle and by authority. If the *name and credit of any individual, other than the defendant*, was introduced and used, at the time of obtaining the goods, he is guilty. On the other hand, if his relation amount merely to the assertion of *any facts with regard to himself*, or of *his own credit and responsibility*, and if on that relation the seller part with his goods, the defendant is guilty of a dereliction from moral honesty, but not of an indictable crime.

In order to render the distinction for which we contend more clear, we shall refer to some cases, in which the accused has been convicted on the ground that he made use of the credit and name of another individual. (Miller's case, 12 Johns. Rep. 292. Joseph Heath's case,

N^W YORK, 1 C. H. R. 116. Peter Johnson's case, 1 C. H. R. 116.
Dec. 1823. Eli B. Mott's case, 3 C. H. R. 155. Solomon Valentine's
The People case, 4 C. H. R. 36.)

v.
Dalton.

Should the court, notwithstanding the suggestions which have been offered on this subject, be of opinion that the prisoner may be guilty under the statute, even when the pretence with which he stands charged consists in a mere *falsehood*, calculated to obtain property on his own responsibility, I shall insist on his discharge on the following ground: The pretence laid in the indictment is not such an one as Hammelin could repose confidence in, consistently with ordinary prudence and caution.

I deem it unnecessary to dilate on the importance of precluding him from all recourse to this court, unless he has, in his transactions with the prisoner, made use of such diligence and care. Were every individual who thought proper to part with his property, on the idle and groundless representations of a stranger, allowed to resort to the criminal tribunals of his country, the attendant evils and inconveniences would be innumerable. One of the principal of these, would be the diminution of vigilance and caution on the part of the seller. Few would suspect a man of resorting to falsehood and deception for the purpose of obtaining goods to a trifling amount, if a severe and ignominious punishment were, in all cases, the certain consequences of detection. Caution would be destroyed, and the bold and artful depredator would find in the confiding and unsuspecting citizen an easy prey. The number of offenders would accordingly be increased, and the catalogue of crime, instead of being diminished, would be swelled almost beyond conception. It is surely better, then, to refuse to heedlessness a

legal sanction, and to adhere to the universal maxim of the law, that courts of justice were instituted for the protection of the vigilant and the watchful, and not of those who slumber.

N^W YORK,
Dec. 1823.
The People
v.
Dalton.

This principle is clearly stated in the case of Cromwell and Field. 3 C. H. R. 38. "Admitting it to be false," (says his honor the mayor, in the case alluded to,) "that Cromwell was solvent, and that Haviland and Field would become his endorsers, it was but a naked falsehood concerning his own circumstances and giving an endorser, and therefore, not indictable on the ground of obtaining goods by false pretences. It was in the power of Otis and Swan to inquire for themselves as to the credit of Cromwell, and also, to ascertain whether Haviland and Field would become his endorsers; and it was, also, in their power to keep themselves completely secured by retaining possession of the goods until the note with the endorsement was furnished. When goods are sold for cash, or for notes, the delivery of the goods, and the payment of the money, or the furnishing the notes, are legally to be considered as concurrent acts; and if, from the confidence placed in the purchaser, or from courtesy, the goods are delivered without the money or the notes, a non-compliance with the contract cannot afterwards be converted into a criminal offence."

Again; "If merchants do their business in this manner, and place reliance on the bare assertions of individuals, when they have it in their power to ascertain the truth of their representations, and, also, amply to secure themselves by retaining the possession of their goods, they ought not afterwards to be permitted to make it the subject of a criminal prosecution. It is their duty, as well as

NEW YORK, their right, to be prudent and circumspect, and thereby to prevent such impositions.”

Dec. 1823.

The People

v.
Dalton.

In full accordance with this opinion, are the decisions in George Lynch's case, (1 C. H. R. 139.) Dinah Perry's case, (1 C. H. R. 164.) John Ring's case, (1 C. H. R. 7,) and the doctrine of the English courts, as it is laid down by Mr. East, (2 Eas. Pl. Cr. 818,) and by other writers of eminence. Numerous authorities might be cited; but I deem those I have already alluded to amply sufficient to establish a point so obviously consistent with reason and sound policy.

I admit that this principle is in some degree impugned by certain dicta in the able and elaborate opinion of his honor C. D. Colden, Esq. in James Conger's case, above cited, (4 C. H. R. 68.) Even the *dicta* of that very able and distinguished lawyer are, no doubt, entitled to the highest consideration. I would beg leave, however, to suggest, that in the case alluded to, the operation of the statute is extended (not merely in my own opinion, but in that of the profession in general,) farther than principle or authority will warrant.

If the court should be of opinion that the indictment cannot be sustained, unless it allege such a pretence as could not be guarded against by the exercise of ordinary care and prudence, let us consider whether such care and prudence have in fact been exercised in the present case.

In the excellent essay of Sir William Jones on the Law of Bailments, ordinary diligence is defined to be such care “as every prudent man commonly takes of his own goods.” (J. on Bail. 26.)

Hammelin parted with his goods to a mere stranger; a man whom he had never before seen, on his bare assertion that he was a grocer residing at No. 77 Chatham-

street, when he might, by the inquiry of a moment, or by merely walking from his vessel to the place in question, have ascertained fully and completely the falsity of the tale. I assert without hesitation, and without fear of contradiction, that this was either gross carelessness or extreme weakness. The former must be the supposition, for every man is presumed to be ordinarily prudent, until the reverse is proved. (Conger's case, 4 C. H. R. 72.)

N-W YORK,
Dec. 1823.
The People
v.
Dalton.

Hammelin, in his testimony, stated that he acted in conformity to the custom of captains of vessels engaged in the same trade. This, we conceive, can have no effect as an extenuation of his laches; for a custom, to be good, must be neither absurd nor repugnant to public policy; and, if these persons generally conform to an usage so preposterous and deleterious as the one in question, it is high time they were admonished to abandon it by the decision of a court of justice.

It may perhaps be urged in reply, that the question of ordinary diligence rests exclusively with the jury. It would be sufficient for me to say in reply to such a suggestion, that this case was reserved expressly for the opinion of the court, on all the points which might be urged in the defence. Independent of this consideration, however, another presents itself, which, we trust, will have much weight in the decision of the question. Uniformity and certainty are the great objects of the law in all its proceedings, even in civil suits. In criminal prosecutions it is of still higher importance. This object can be attained only by the adjudications of a court, and not by the vacillating and uncertain opinions of different juries. I will mention one instance, only, in which courts have taken the same point under their special and exclusive control.

NEW YORK,
Dec. 1823.

The People
v.
Dalton.

I allude to due diligence in the case of notice of protest to the drawers and endorsers of bills of exchange, and to the endorsers of promissory notes. This was at first regarded as a matter for the jury alone. The point was utterly unsettled. It was afterwards considered as a mixed question for the court and the jury. Still no definite principle was established. It was at length held to be a fair subject for the exclusive adjudication of the court, and order and regularity followed. I conceive that the latter rule, by parity of reason, to say the least, should be adopted in the present case. (Kyd on Ex. 80, 81. Dong. Rep. 546, 581. Chit. on Bills, 290.)

If the court should, on the whole, be of opinion that a sufficient false pretence is set out in the indictment, I have still another point to urge in favour of the prisoner, which does not arise on the record, but which I conceive affords a conclusive ground on a motion for a new trial. It clearly appears from Hammelin's testimony, that in parting with his property, he was influenced not *solely* by the pretence alleged in the indictment, but, in a great measure, by a prepossession in favour of the defendant, in consequence of the latter's having made an antecedent purchase, and paid the amount agreeably to his promise.

In the first place, we would observe, that if a man obtains property from another in consequence of two or more "*false pretences*," operating jointly on the mind of the seller, there can be no doubt but both must be set out in the indictment. We grant, for the sake of illustration, that the pretence set forth in the present instance is in itself sufficient to warrant a judgment. Let us *then* suppose Dalton to have stated, (as he has done,) that he was a grocer, residing at 77 Chatham-street, *adding*, that he was employed by J. S. and T. N., persons of known responsibility and opulence, to purchase

the goods on their account and credit : could the present indictment, alleging only the one pretence, have been sustained in such a case? Surely not; for if it were only necessary to set out the one, the defendant might be indicted at the succeeding term for obtaining the goods on the other, (to wit, on the allegation that he was employed by J. S. and T. N. ;) and could not avail himself of his plea of *autrefois acquit*, in bar of the second prosecution, inasmuch as it would not appear on the record that the two prosecutions were for the same offence. (1 Chit. Cr. Law, 368, 369. 2 Leach, 717. 1 Eas. Pl. Cr. 522. 9 Eas. Rep. 437. 3 Inst. 213.)

N^W YORK,
Dec. 1893.
The People
v.
Dalton.

Again, the statute in question is highly penal, and is of course to be construed strictly. I do not insist on the frivolous and ridiculous distinctions which have sometimes been urged, and even sustained, in relation to this subject. I do not allege that a statute enacted to punish stealers of "horses," would not apply to a man who should steal a single horse; nor that an act mentioning dogs, could with propriety be confined, by the technical scruples of grave and learned expositors of the law, to the masculine gender alone. But I do contend, that the counsel for the people is bound to bring his case, substantially and strictly, within the provisions of the act and the allegations of the indictment. These requisitions are not complied with in the present instance, as I shall endeavour to show conclusively to the court.

The statute provides, that "every person who shall hereafter be convicted of knowingly and designedly, by *false pretences*, obtaining," &c. Now, can it be for one moment contended, that the requisitions of this act are satisfied by evidence that A. B. obtained goods by a certain false pretence, *combined with another act*? Surely

N^W YORK,
Dec. 1823.

The People
v.
Dalton.

not in any case—much less when that *other act*, which operated as a *joint inducement*, is in itself an innocent one. Were it otherwise, an individual might be convicted under the statute, when the false pretence had *no more influence* on the mind of the original owner of the goods, than another perfectly innocent act of the accused. Nay, the pretence alleged may have had but a small and trifling effect, compared with that of the innocent inducement. Can the court pry into the secret impulses which actuate the hearts of men, and influence their conduct? Can a human tribunal, when a motive is mixed, estimate with mathematical precision the weight of its component parts? It is absurd to pretend it! I would venture to assert, that if Hammelin himself were here, he could not tell which had the most powerful effect in inducing him to part with his property—the pretence charged, or the prepossession created in favour of the accused by his honesty in the first transaction. The rule then must be, that to bring a case within the construction which the court are bound to give to a penal statute, the false pretence set out in the indictment must be the *sole act of the accused, operating on the mind of the person alleged to have been defrauded*.

This doctrine is distinctly recognized in the case of James Conger, above cited, in Abraham Collin's case, (4 C. H. R. 143,) Lucre and Markford's case, (1 C. H. R. 141,) and in William Davis' case, (4 C. H. R. 61.) This last case I conceive to be in point.

I do not deny the authority of Robert W. Steel's case, (5 C. H. R. 5.) There the prisoner had been several times in the store of the person whom he defrauded, prior to the period at which he obtained the goods in question; and the fact of his having seen the prisoner before, ope-

rated, in some degree, with that person, as an inducement to part with his goods on credit. Here was a mere *accidental circumstance*, forming no part of the *res gesta*; and which of course could not enter into the decision of the case, whatever weight the party injured might, of his own impulse, have attached to it. Nor would it perhaps have been otherwise, if the dress or equipage, the intelligence and information of the prisoner, or the respectability of his connexions and associates, had operated in some degree on the mind of the prosecuting witness. Indeed, it has been repeatedly, and I believe, correctly, decided, (particularly in James Conger's case,) that these are so vague and intangible, that the court cannot notice them in any way.

N^W YORK,
Dec. 1823.
—
The People
v.
Dalton.

In the present instance, however, there is a distinct and substantive act of the prisoner, taking place at the very time of, and immediately connected with, the false pretence alleged—innocent in itself—forming part of the *res gesta*—and constituting an important part of the inducement. Surely, then, the accused cannot be said to have obtained the goods *solely* on the pretence set forth in the indictment; and if this be true, he must, on a new trial, be acquitted.

In the course of my argument, I have cited, for the most part, the decisions of this court. The reasons which have induced me to do so are obvious. As the offence in question is created and defined by our own statute, but few English authorities are at all applicable: and very few cases have been decided in the supreme court of this state. Those, however, which have been adjudged here, are numerous; and have generally been decided on solemn and able argument.

I now consign James Dalton to the protection of the
VOL. II. 23

NEW YORK,
Dec. 1823.

The People
v.
Dalton.

laws; confident that, whatever may have been his guilt in point of morality, the court will remember, in the decision of his case, that "legal forms are the barriers of justice."

After an able argument by H. Maxwell, Esq., (District Attorney,) on the part of the people, the defence was closed by Blake for the defendant, and the case taken under advisement. On the last day of the term, the following opinion of the court was delivered by his honor the Recorder:

Per Curiam. The law which governs this case, and all others under the statute, which makes it an indictable offence to obtain property by false pretences, with intent to cheat, is laid ably down by Mr. Colden, Mayor, in the case of the People v. James Conger, decided May Sessions, 1819, (4 C. H. R., 65.)

That case, and others to which it refers, decide,

1. That the statute has a very extensive application, and embraces a variety of *false pretences* not punishable at common law. (People v. Johnson, 12 Johns. Rep. 292. Rex v. Young and others, 2 Leach, 574. 2 East's Pl. Cr. 829.)

2. The false pretence must be by words, by writings, or by signs, and cannot consist in mere *show* or *appearance*—by equipage, dress, &c. (Conger's case, 4 C. H. R., 69, 70.)

3. The pretence must be made *before* the property is delivered. (John Stuyvesant's case, 4 C. H. R., 155.)

4. The pretence must be of an existing fact. (Conger's case, 4 C. H. R., 68.) and not a mere promise or representation that such or such a thing shall be done—as to pay cash—that a check shall be good or paid,

&c. (Ibid. 68, 69. Stuyvesant's case, 4. C. H. R., NW YORK, Dec. 1823. 156.)

5. But, where J. S. pretended that he was the captain of a vessel from a foreign port, just arrived, and by that means obtained goods, his offence was held indictable under the statute. (Samuel Smith alias Captain Juben's case, 5 C. H. R., 180.)

The People.
v.
Dalton.

7. We are of opinion, that the authorities, on the whole, warrant the decision in the case last cited. It is also supported by the precedents to be found in English works of acknowledged correctness and high reputation. (Cr. C. Comp. 303.) This is a precedent where the defendant pretended that he was a merchant of great fortune, and was a housekeeper, residing at Penjo Common. The *tast count* charged the *pretence* that he was a merchant *only*. (6 Went. S. P. Index, tit. "Frauds," Eng. ed. 2 Starkie, 473. 3 Chitty's C. L. 1006., Eng. ed.)

Applying the principles above stated to Dalton's case, the court is satisfied that the pretence charged in the indictment, i. e. "that he was a grocer residing in Chatham-street," is sufficient to bring him within the statute.

7. The pretence must not be so absurd and irrational that no man of common sense would believe it to be true. But still it need not be so cunning and artful as to deceive a man of ordinary caution. (Abraham Collin's case. 4 C. H. R., 149. Conger's case. ib. 71.

8. We are of opinion that, whether the false pretence be of a nature calculated to deceive a party or not, is a question for the jury. (Abraham Collin's case, 4 C. H. R. 143. 149. Conger's case, 4 ib. 72. 2 East's Pl. Cr. 828.)

N^W YORK,
Dec. 1823.


The People
v.
Dalton.

We are of opinion, therefore, that the second ground taken by the counsel for the prisoner is not tenable, and, accordingly, the *motion in arrest of judgment is overruled*.

9. The *false pretence* must be the *sole inducement* for parting with the goods. (John Davis' case, 4 C. H. R., 61. 2 East, 831.)

10. Though such false pretence must be the *sole inducement*, and must be fully set forth in the indictment, yet accidental circumstances, which in conjunction with the false pretence influenced the delivery, need not be set out. (Robert W. Steel's case, 5 C. H. R., 5—7.) As the dress of the defendant, having seen him before, and the like.

We are satisfied, from an attentive examination of the authorities, that dress, style in appearance or living, keeping genteel company, resorting to fashionable places, and, perhaps, even former dealings with the party injured, though these circumstances may facilitate the fraud, need not be set out if they be not necessarily connected with the false pretence, and if they do not form part of the fraudulent scheme or *res gesta*. In such case they do not, in judgment of law, constitute any part of the inducement, and, consequently, need not be laid in the indictment.

In this case, however, the witness is understood to have said in substance, that he would not have trusted Dalton on the false pretence *alone*; and as the motive which, in addition to the false pretence, operated on the mind of the witness when he gave credit to Dalton, may have constituted part of the *res gesta*; and as this was one of the points reserved for the opinion of the court on its materiality, we, on this ground, direct a
NEW TRIAL.

MUNICIPAL COURT.

BOSTON, JANUARY, 1823.

<i>The Commonwealth</i>	}	LIBEL.
vs.		
<i>Joseph T. Buckingham.</i>		

Present—Honourable *Peter O. Thatcher*, Judge.

James T. Austin, Esq., Counsel for the Commonwealth.

Hon. Benjamin Gorham and *S. L. Knapp, Esq.* Counsel for Defendant.

This was an indictment found by the Grand Jury for the county of Suffolk, at the November term, 1823, of the Municipal Court for the city of Boston. The cause was continued, and afterwards assigned for Friday, January 9th, 1824. The court opened at 9 o'clock, A. M.

INDICTMENT.

Commonwealth of Massachusetts.—Suffolk, to wit: At the Municipal Court of the city of Boston, begun and holden at said Boston, within, and for the county of Suffolk, on the first Monday of November, in the year of our Lord, one thousand eight hundred and twenty-three.

The Jurors for the Commonwealth of Massachusetts on their oath present, that Joseph T. Buckingham, of Boston aforesaid, Printer, on the first day of September, in the year of our Lord, one thousand eight hundred and twenty,—at Boston aforesaid, with force and arms, maliciously contriving and intending to injure, aggrieve, villify, scandalize, and defame the good name, fame and reputation, of one Alexis Eustaphie, who was then and there residing in said Boston, and was then and there a Consul accredited to the United States of America, from His Majesty the Emperor of all the Russias, with whom the said United States then were, and still continue to be, at peace, and intending as much as in him lay, to bring the said Alexis

BOSTON,
Jan. 1823.

The Comth
v.
Buckingham.

into *contempt, hatred, infamy, and disgrace*, did compose, print, and publish in a certain newspaper, called *New-England Galaxy and Masonic Magazine*, whereof the said Buckingham was editor and publisher, a certain false, scandalous, and malicious libel, and did cause and procure to be published in said newspaper, the said certain false, scandalous, and malicious libel of, and concerning the said Alexis, and of and concerning *the conduct of the said Alexis as a parent, and of, and concerning the manner of treatment by said Alexis' daughter*, in which said malicious, false, and scandalous libel is contained, among other things, the false, scandalous, and malicious words following, that is to say, "We in this part of the union boast much of our skill in music, but a few of us who have been in Europe are unwilling to see this divine art treated with such little respect as to witness the total want of taste, expression, and feeling in our musical friends. We should no longer award the palm to those [meaning among others the said daughter of said Alexis] who by incessant drilling under a cruel and heartless master, [meaning said Alexis,] have attained a rapidity of fingering which serves only to astonish for a moment, but which produces no effect upon the feelings, except pity for the almost lifeless automaton [meaning the said daughter of said Alexis] whose haggard cheeks and feeble frame evince the daily drudging to which [meaning the said daughter of said Alexis] has been subjected by threats, promises, and flattery; a feeling which is not alleviated by the smallest ray of kindness or affection in the parent, [meaning said Alexis] who [meaning said Alexis] sacrifices all the future prospects of a child's, [meaning the said daughter of said Alexis] happiness at the altar of ambition, a virtuous and enlightened community should frown indignation and contempt upon the tyrant, [meaning said Alexis]" to the great damage of said Alexis, to the pernicious example of all others in like case offending, and against the peace of said Commonwealth.

And the jurors aforesaid, on their oath aforesaid, do farther present, that said Joseph T. Buckingham, at said Boston, with force and arms, on the thirtieth day of November, in the year of our Lord eighteen hundred and twenty-one, farther contriving and intending to injure, scandalize, vilify, and defame the good name, fame, and reputation of said Alexis Eustaphieve, then residing in said Boston, and performing the duties of a Consul of the Emperor of all the Russias, with whom said Commonwealth then was, and yet continues to be, at peace, and maliciously contriving and intending as much as in him lay, to bring the said Alexis into public ridicule, contempt, and disgrace, did compose, print, and publish, and did cause and procure to be composed, printed, and published in a certain newspaper, entitled, *New-England Galaxy*, a most wicked, false, scandalous, and malicious libel of, and concerning, the said Alexis, and of, and concerning the life and opinions of said Alexis; which said libel contains, among other things, the false, scandalous, and defamatory words following, that is to say, "The life and opinions of U. Stuffy, [meaning said Alexis,] 1 vol. 4to. imperial foolscap, bound in Russia—contents, chap. 1: His [meaning said Alexis] birth and infancy, sucks a bear, Romulus and Remus—His [meaning said Alexis] wet nurse licks him [meaning said Alexis]—weaned on fish's roe and fiddlehead—How he

[meaning said Alexis] gets on in every thing—His [meaning said Alexis] amusements, fishing and fiddling,”

And, also, the following false, scandalous, and defamatory words, that is to say, “Chap. VI. His [meaning said Alexis] dislike to Caledonian literature, and why—His [meaning said Alexis] being taught to dance to the Scotch fiddle, and the superiority of the latter to his [meaning said Alexis] own.—Burnt bear dreads hot iron—Condemns the author of Waverly, supposing him to be a Scot. A set-to between the big bear [meaning said Alexis] and a dandy—Pro and con. concerning the same,”—to the pernicious example of all others, and against the peace of said Commonwealth.

And the jurors aforesaid, on their oath aforesaid, do further present, that said Joseph T. Buckingham, at said Boston, with force and arms, on the seventh day of November, in the year of our Lord eighteen hundred and twenty-three, further continuing his malicious disposition, and contriving and intending, falsely and maliciously, to injure and destroy the good name, fame, and reputation of the aforesaid Alexis Eustaphie, the said Alexis then residing in said Boston, and being the Consul of the Emperor of the Russias within said Commonwealth between whom and said Commonwealth, there then was a firm peace, and to cause a belief that said Alexis engaged in quarrels unworthy his said station and office, did compose, print, and publish, and cause and procure to be composed, printed, and published in a certain newspaper, called New-England Galaxy, a certain false, scandalous, malicious, and defamatory libel of and concerning the said Alexis, and of and concerning the conduct and behaviour of the said Alexis, at a certain place in said Boston, commonly called Concert Hall, on Tuesday, the fourth day of said November, at a certain exhibition and ball there given by certain persons called Parks and Labasse, and after the same, which said false, scandalous, and malicious libel contains the false, scandalous, and defamatory words following, of and concerning said Alexis, and of and concerning his conduct at said place, called Concert Hall, that is to say :—“Record of fashion.—The pupils of Messrs. Parks & Labasse gave a splendid exhibition of dancing at Concert Hall on Tuesday. The elegance of attitude, and the gracefulness and ease of their movements, afforded a proof of the science, skill, and taste of their instructors, and elicited the approbation of a crowded and fashionable concourse of spectators. A communication respecting this exhibition and ball has been received, the chief object of which is to give the details of an unpleasant and disgraceful disturbance which occurred in the course of the evening. The history would not do much honour to the parties concerned, and we [meaning said Buckingham] decline its publication at present, though it is but just to the character of Mr. Parks to say, that we [meaning said Buckingham] have not heard that any blame was attached to his conduct on the occasion, but that on the contrary, he kept as much aloof as possible from the scene of anger and confusion. The rugged Russian bear, [meaning said Alexis] it is said, was a conspicuous actor in the farce which had well nigh turned out to be a tragi-comedy, in consequence of his [meaning said Alexis] attempting to jump with his [meaning said Alexis] cocked hat and all down the throat of one of his [meaning said Alexis] opponents. We [meaning said Buckingham] think with our [meaning said

BOSTON,
Jan. 1883.

The Com'rs
v.
Buckingham.

BOSTON,
Jan. 1823.

~~~~~  
The Com'rs  
v.  
Buckingham.

Buckingham] correspondent, that it is best at the present moment to give no opinion on the merits of the controversy, but leave it to the decision and final adjudication of him [meaning said Alexis] who, [meaning said Alexis] while acting as the representative of the greatest monarch in the world, the magnanimous Alexander, the Autocrat of all the Russias, the honorary member of the Massachusetts Peace Society, the grand Pacificator of Europe, does not deem it a derogation from his [meaning said Alexis] high vocation to become a party in the quarrels of dancing masters and fiddlers,"—meaning that said Alexis was a party in the quarrel of dancing master and fiddlers at said Concert Hall, at the time aforesaid, and then being Consul as aforesaid, against the peace of said Commonwealth.

A true bill, WM. JENNISON, Foreman G. J.  
James T. Austin, Attorney for Commonwealth.

True Copy. Attest, W. MINOT, Clerk Municipal Court.

After the indictment was read, the attorney for the commonwealth stated to the jury, that it contained three distinct counts, each of which was a distinct, independent indictment, and consequently that a conviction or acquittal on either, would not amount to a conviction or acquittal on either of the others.

Messrs. Jefferson Clark, Ezekiel Morse, John S. Ellery, Bryant P. Tilden, Alexis Eustaphieve, and William Coffin, were examined as witnesses on the part of the prosecution, to prove the publication, and that the articles complained of had reference to Mr. Eustaphieve.

It appeared, that the third count in the indictment was at variance with the article in the paper; the word "evening" after Tuesday having been omitted. After argument, the court decided, that the variation was fatal to that count, and consequently no testimony relating to it could be admitted. In the course of the trial, the attorney for the commonwealth entered a *nolle prosequi* on the third count.

Mr. Knapp opened the defence. He contended, that the articles complained of were not libellous; that the first could have no allusion to Mr. Eustaphievè; and that the second was a good-natured and harmless piece

of satirical writing, which only ridiculed the writings of the complainant, and was common and justifiable. He read the case of *Sir John Carr v. Hodgdon and others*, which, it was contended, was applicable to this case.

BOSTON,  
Jan. 1823.  
The Com'th  
v.  
Buckingham.

The court adjourned to three o'clock, P. M.

Mr. *Knapp*, in continuation, stated, that the piece complained of in the first count of the indictment, was a piece of general criticism; that it contained no allusion to the prosecutor; that it was general in its intent and tendency; that he (the prosecutor) had no more right to apply the remarks to himself, than any man who had given a piece of bread or a cup of water to a perishing fellow creature, had to appropriate to himself all the eulogiums which ages had bestowed on the charitable and philanthropic; no more than an individual miser had to make a personal application of all the invective and reproach which have been bestowed on niggardliness and avarice. That it could not allude to Mr. Eustaphieve and his daughter, was evident. The testimony of Messrs. Ellery, Tilden, and Coffin, all proved that he was a kind and indulgent father. The publication alluded to, and concerned, a general system of education, where severity was used to promote improvement.

In respect to the piece charged as libellous in the second count of the indictment, Mr. Knapp could not believe, for a moment, that the jury could consider it as a libel. It was a mere bagatelle—such as is found every day in the newspapers and reviews, and which no man but one of extreme excitability ever thinks of resenting seriously. He acknowledged that it *might* allude to Mr. Eustaphieve; but it amounted to nothing more than an attempt to raise a laugh at his writings. Mr. Eustaphieve was an author—he had written a play—sundry political

BOSTON,  
Jan. 1823.  
The Com'th  
v.  
Buckingham.

works—dramatic criticisms—and an epic poem. His taste and opinions differed from those of the Americans, and he had attempted to correct what he supposed to be our bad taste. The public did not much approve his epics; but he (Mr. Knapp) hoped that posterity would do him justice. Homer was not rewarded in his own day and by his own countrymen, but later ages had given him the praise which was due to him. Mr. Eustaphieve, in the piece in question, was ridiculed as an author. There was no imputation on his official or moral character; there was no charge, which if true, could subject him to any sort of legal punishment; nothing which could in the least degree affect his standing in society. It might be true, that he was there alluded to by the word *bear*. But this was not a term of reproach. The term signified, figuratively, strength and wisdom. *Bear*, in hieroglyphics, according to *Bailey*, was used by the ancient Egyptians, to represent a good proficient, when time and labour has brought to perfection, because bears are said to come into the world with misshapen parts, and that their dams do so lick the young, that at last the eyes, ears, and other members appear. Shakspeare making king Henry say,

Call hither to the stake my two brave *bears*,  
Bid Salisbury and Warwick come to me, &c.

Messrs. E. Frothingham, J. Dodd, T. Minns, John Parker, and Thomas Grainger, were called and sworn as witnesses on the part of the defendant.

E. Frothingham testified, that when he read the piece complained of in the first count, he did not consider it as applying to Mr. Eustaphieve. There was a foreigner in Boston some years ago, who had two or three children remarkable for their acquirements in music, and


whose system of discipline was cruel and severe. That he had seen this man, at a certain time, strike one of the children in a large party, where the circumstance excited considerable feeling, and was thought to be cruel.

Mr. Dodd's testimony was essentially the same.

The other witnesses sworn on the part of the defendant, were not examined; the court having decided, after arguments, that the testimony expected to be drawn from them was inadmissible.

Mr. *Gorham*, in closing the defence, regretted that the testimony, which had been thought material by the defendant's counsel, should have been excluded by the court. It was their intention to have shown, by undoubted testimony, that the prosecutor had subjected himself to animadversion in the newspapers as an author and a critic, assuming the office of a dictator in matters of taste, and endeavoring to direct our public amusements; and give a tone to public sentiment; that, as such, he had no right to complain, if he were dealt with as all others are who follow the same course. This prosecution, Mr. *Gorham* contended, was not commenced in order to preserve the public peace, nor was it necessary, to that end, that it should have been brought forward at the present time. It was instigated by anger and resentment on the part of the prosecutor. Else why had the attorney for the commonwealth and eight or ten successive grand juries, whose duty it is to prosecute all breaches of the peace, been silent on the subject for more than three years? It was evident, that the temper of the complainant had incited him to procure the present indictment, and that, in fact, he was now the aggressor, and committing an act which tended to a breach of the peace. He denied that the first piece alleged to be li-

BOSTON.  
Jan. 1823.

  
The Com'th  
v.  
Buckingham.

BOSTON,  
Jan. 1833.  
~~~~~  
The Com'th
v.
Buckingham.

bellous had any allusion to the Russian Consul. It was a piece of criticism, general in its nature and object, and it had been proved that there was another individual in Boston at the time of its publication, to whom the censure would equally apply. Admitting that it did allude to him, the defendant ought not to suffer for its publication; for he was much absent at the time, and knew but little of what was inserted in the paper, owing to sickness and death in his family. The very paper which contained the alleged libel, contained notice of the death of one of his children, and an apology for his neglect of editorial duties. As to the second piece, Mr. Gorham declared it was no more a libel than was the piece called *My Pocket Book* on Sir John Carr, which Lord Ellenborough had scouted out of court, as the jury already knew from the case which had been read to them. He admitted that it was coarse and rude; but that it could not injure the reputation of any man; it had very little wit in it: and that he should rather be the *subject* than the *author* of it. If it alluded to Mr. Eustaphteve at all, it alluded to him as a writer. Mr. E. had written some works, which had been severely handled by the Edinburgh Reviewers, and he had replied, in a strain which indicated that he was not pleased with their criticisms. This was what was meant by "his dislike to Caledonian literature—and why." His uneasiness under the lash they had inflicted was pretty evident, and this was all that was intended by "dancing to the Scotch fiddle." Mr. Gorham dwelt with emphasis on the fact, that the latest of the pieces complained of appeared more than two years ago; a circumstance which precluded the prosecutor from claiming any redress in a civil action.

Mr. *Austin* summed up the testimony for the prosecu-

tion, and commented thereon with his usual clearness and rapidity. The defendant being proved to be the editor and proprietor of the *Galaxy*, it was of no consequence, (he said,) whether he was in the office at the time of the publication or not. He was responsible for all that appeared in the paper. It was for the jury to consider whether the articles complained of were libellous; and that the first one was so, he thought no one doubted. It had been shown that it could apply to no one else but the Russian Consul, and it was calculated to wound him in the tenderest point, by holding him up to the indignation of the public as a cruel and heartless father. The piece complained of in the second count, he contended, was also grossly libellous; and the writer could have had no other object than to expose Mr. Eustaphie to public scorn and ridicule. Mr. Austin spoke about twenty-five minutes, and at the conclusion of his argument, the court adjourned to nine o'clock the next morning.

On the opening of the court on Saturday, his honor Judge Thatcher charged the jury as follows:

Gentlemen of the Jury,

The defendant, Mr. Buckingham, is charged with the offence of having composed, printed, and published two libels against Alexis Eustaphie, the Consul of his Russian Majesty residing in this city, with the malicious intent to defame and vilify him, and bring him into contempt, hatred, and ridicule. The first relates to his conduct as a parent; the second, to his life and opinions. The third count has been withdrawn since the commencement of this trial, and must be wholly disregarded by you. In legal contemplation the two counts are several indictments. The defendant may be

BOSTON
Jan. 1893.

The Com'th
v.
Buckingham.

BOSTON,
Jan. 1823.


The Com'rs
v.
Buckingham.

convicted on one and acquitted on the other ; or you may render a general verdict on both, as you shall finally consider yourselves justified by the law and the evidence. It has not been controverted that the pieces complained of are set forth in the indictment correctly.

You must be satisfied, before you can find a verdict against the defendant, that the pieces which are complained of were published by him—that they relate to the Russian Consul, and are libels upon him—and that they were published by the defendant with the malicious intent to defame the Russian Consul, and to bring him into hatred, contempt and ridicule.

On you devolves the duty “to decide at your discretion, by a general verdict, both the fact and the law involved in this issue.” But in committing the case to you, it belongs to me to expound to you, with candor and simplicity, the principles of law which are applicable to it, with the view of assisting you in the performance of your duty, and to enable you to come with confidence to a correct result.

Trials of this kind are rare, and, perhaps, from that cause they excite a degree of interest which is out of proportion to the offence.

But if from any cause you are conscious of any undue interest, or feel any prejudice, you will suffer me to caution you to dismiss them from your bosom as the enemies of good judgment.

Though this case, as most other criminal prosecutions, might have had its origin in the complaint of an individual, you are not trying the complaint of an individual, but a presentment of the grand inquest on their oaths, who are bound by law “diligently to inquire, and truly to present all crimes and offences committed within

the body of this county." This is not, therefore, a vindictive suit by the Russian Consul, to recover damages for wounds inflicted on his character and feelings. So far as these are concerned, the remedy is by a civil process in another court, and, whatever may be the event of this prosecution, the personal injury and the civil redress will in no degree be affected.

BOSTON,
Jan. 1823.

The Com'th
v.
Beckingham.

The questions, what is a libel, and why it is deemed a public wrong, are answered in a clear and satisfactory manner by our Supreme Judicial Court, in the case of *The Commonwealth vs. William Clapp*, 4 Mass. Rep. 165. The opinion in that case was pronounced by the late Chief Justice Parsons, who was a most humane judge of Criminal Law, and always gave to a party on trial the full benefit of his learning and talents, to screen him from an illegal conviction.

"A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of the dead, or the reputation of one who is alive, and exposing him to public hatred, contempt or ridicule."

* See Hamilton's definition in *Croswell's case*, 3 Johns. Cases, 254. The freedom of the press is now amply protected in New York by the following provision in the constitution: "Every citizen may free-

"The cause why libellous publications are offences against the state, is their direct tendency to a breach of the public peace, by provoking the parties injured, and their friends and families, to acts of revenge, which it would not be easy to restrain, were offences of this kind not severely punished." A citizen would be apt to consider himself justified in revenging himself on one who

ly speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or the press. In all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted, and the jury shall have the right to determine the law and the fact." Art. 7, § 8. See also the remarks of the Recorder, ante, vol. 1, p. 353, 4.

BOSTON,
Jan. 1823.

The Com'th
v.
Buckingham.

had maliciously defamed him, and rendered him an object of hatred, contempt or ridicule, if the society to which he belonged did not punish the offender. Our law is not defective in this particular, and all pretence for private violence is removed. "A man appealing to the public justice for redress of an injury, must think himself acquitted in his reputation, when he sees that the state resents as an insult to itself a wrong done to his person, property or character." Private revenge for injuries received is a violation of that first principle of society by which each member agrees to give up a portion of his natural rights to secure the more perfect enjoyment of the remainder. No man under the protection of the law is to be the avenger of his own wrongs.

It requires no argument to prove that a libellous publication is not less likely to produce violations of the peace, because it is founded in truth. And therefore, however, it is, that if a man publishes an injurious truth of another, the truth of the publication will be a justification in a civil action for damages; yet such defence will not avail in an indictment for a libel, except in the case which arises from the genius of our constitution, "of publications respecting candidates for a public office, conferred by the election of the people, and of persons holding a public elective office," the people having an interest in the publication of truths relating to their public servants. The exception extends also to the case "of complaints to the legislature for the removal of an unworthy officer," and to some other cases; where the purpose being first proved to be justifiable, that is, done with good motives and a justifiable end, a defendant might be permitted to give in evidence the truth of the words.

I think this exception secures to the public all necessary intelligence upon all proper occasions, and would protect printers in publishing facts relating to individuals, in which the community has an interest, in many of those cases to which the honourable and learned counsel for the defendant alluded in his closing argument, where such publications should not carry on their front the palpable intention to defame.

Considering the interest which seems to be attached to this subject, you will permit me to detain you, for a moment longer, on the law of libel, which I consider has been established in this commonwealth on principles of the highest wisdom.

The great struggle in England forty years ago, on this subject, arose from the judges having arrogated to themselves the right exclusively to decide in all cases the question, whether a publication complained of were a libel or not, and from their directing the jury to pronounce a general verdict of guilty or not guilty, as they should be satisfied that the defendant did or did not publish the paper, and as it was or not truly set forth. The British nation justly considered this as stripping the subject of his defence of a trial by jury, and the struggle resulted in the act of 32 Geo. III. c. 60., which declared, "that on every trial for a libel, the jury sworn to try the issue might give a general verdict of guilty or not guilty upon the whole matter put in issue, and should not be required or directed by the court or judge before whom the trial was had, to find the defendant guilty, merely on the proof of the publication by such defendant of the paper charged to be a libel, and of the sense ascribed to the same in the indictment."

BOSTON,
Jan. 1833.

The Com'rs
v.
Buckingham.

BOSTON,
Jan. 1823.

The Com'th

v.

Buckingham.

During the debates on this bill in the House of Lords, the twelve judges, upon a question put to them, declared "that the truth or falsehood of the written papers are not material to be left to the jury upon the trial of an indictment for a libel; and that it made no difference, whether the epithet *false* were or were not used in it." The greatest lawyers, statesmen, and orators of the English nation took a part in this interesting discussion. But they were content to restore to juries their right of deciding both on the law and on the fact, as it undoubtedly existed at the common law. No one contended that on an indictment for a libel, the truth of the matter should be a defence to the charge; and we do not find in the statute itself, that there is any provision on this point. And yet, gentlemen, the great Lord Erskine, the champion of English liberty, of the rights of the press, and of the trial by jury, and who has just closed his mortal career, observed in the House of Lords, upon a solemn occasion, so late as the year 1808, "that the law of libel had been brought as near perfection as was perhaps possible: though in earlier life, he did not think that the practice of the courts was right in some points, yet he had lived to see it remedied." 30 State Trials, 1344.

In this commonwealth the citizens enjoy, in cases of this description, every privilege which is secured to the subjects of Great Britain, together with the farther right, that the truth shall avail as a justified defence, in certain cases, arising under our peculiar political institutions, to which I have before alluded. The law on this subject was settled on great consideration, in the case against *William Clap*, by the Supreme Judicial Court, to which an appeal lies in all cases from this court, and which, by its prerogative, corrects the errors of all other judicial

tribunals of the commonwealth. The decisions of that court are reported by a public officer, under the authority of the legislature, as the most authentic expositions of the law, for the purpose of diffusing among the citizens information on subjects of the greatest interest. The solemn decisions of that court are considered as binding on the several judges at their *Nisi Prius* terms, and on all inferior tribunals. I freely avow, that I consider them as binding on me, generally upon the principle, that what is determined in that court, upon solemn argument, establishes the law, and is a precedent for future cases in that and in all inferior tribunals. *Eadem lex Romæ, eadem Capuæ.* It is the right of the citizen to be governed by *certain laws*. Now, what *certainly* would there be in laws, if a different rule of interpretation, on any subject, should be adopted in this court from what prevails in the Supreme Judicial Court on the same subject? It would at once take from the minds of the citizens all confidence in the administration of justice here.

The law, as it is laid down by the Supreme Court in Clap's case, is not in violation of the constitution. That instrument is to be construed so as that its various provisions may harmonize with each other. While it declares "that the liberty of the press is essential to the security of freedom in a state, and ought not, therefore, to be restrained in this commonwealth," it guarantees to each citizen "life, liberty, property, and character." It declares, "that it is essential to the preservation of these, that there be an impartial interpretation of the laws and administration of justice;" and it lays down as the first principle of our government, "that all shall be governed by *certain laws* for the common good." How long would "life, liberty, property, and character" be safe,

BOSTON,
Jan. 1823.

The Comth
Buckingham.

BOSTON,
Jan. 1823.

—
The Com'th
v.
Buckingham.

and what would be their value, if the press were not under restraints of the law ? The liberty of the press is not confined to publishing truth. It is as large as human liberty is in any respect. We are free to act ; nor has it yet been thought an infringement of civil liberty, that we are answerable for our actions, and liable to punishments for violations of the law. So the liberty of the press consists in being free to publish any thing, true or false, without previous restraint, subject only to the control of the law for the abuses of that liberty.

Among the Romans, it was at one period a part of their polity, to appoint a censor of the public manners. Among other high duties of this officer, he had a right to inspect the public and private character of the citizens, and might even degrade a senator from his high rank, if he rendered himself an object of public odium or contempt. Modern governments have not seen fit to imitate this institution. In our commonwealth, no individual may erect himself into a sort of domestic tribunal, to try and condemn those who incur his disappointment, by any singularity of manners, peculiarity of sentiment or character, or even by any defect in morals. Nor may he with impunity presume to hold up his fellow citizens to odium, contempt, or ridicule.

These principles of law, handed down from antiquity, and qualified by our own wise institutions, have, I trust, governed me in deciding some very important questions which have arisen in the course of this trial ; and it will not be safe for you, gentlemen, to depart from them when you retire to make up your final opinion, let them operate as they may, either for the government or for the defendant. Hard would be the task of jurors, and uncertain would be the tenure of all our rights, if the decis-

ion of cases should depend on the will of jurors, not guided by the known and established rules of law.

From this general survey of the law, you will return with me, gentlemen, to the present case, of which I will endeavor to take a summary view.

And first, are you satisfied from the evidence, that the defendant published the pieces which are complained of as libellous? Although the defendant is charged with having *composed, printed, and published*, it will be sufficient to authorize your verdict, if you believe the fact of *publication* merely.

To this point, you have the testimony of Jefferson Clark, who says, that he has been engaged in the printing establishment of the defendant from the year 1817 to this time, with the exception of a short absence in the year 1822; that the defendant is the publisher and editor of the New-England Galaxy; that he usually corrects the press; that he, the witness, sometimes, but very rarely, and only in the absence of the defendant, performs that duty. When shown the number of the Galaxy of September 1, 1820, which contains the first article complained of, he said he believed it to be a paper which was printed in the office of the defendant, because it resembled the newspaper printed by him, but he would not undertake to swear to the identity of the publication. He says, that at and about that time, the defendant was detained at home, and was a good deal absent from the office, being with his family in the country, who were at that time visited with a domestic calamity. But he was in and out of the office, and he left no substitute to correct the proof. Now, as the paper was printed in the office of the defendant, by his servants, and for his profit, and

BOSTON,
Jan. 1832.


The Com'r
v.
Buckingham.

BOSTON,
Jan. 1823.

The Com'th
v.
Buckingham.

as he has never disavowed it, he is in law answerable for the contents.

The paper which contains the alleged libel was purchased at the defendant's office in September, 1820, by Ezekiel Morse, the servant of the Russian Consul, and carried to him, and marked at the time. This fact alone is evidence of publication; it being a reasonable and well-known principle of law, that if a man sells a libel by his servant, it is considered as evidence of a publication by him, unless he show that the servant acted without or against his authority.

Jefferson Clark likewise testifies, that he believes the number of the New-England Galaxy, of the date of November 30, 1821, which contains the second alleged libel, was published by the defendant, being similar to the newspaper printed by him at that time. Nothing is shown from which you may infer that this paper is not a genuine number of the Galaxy which was issued on that day.

Secondly, are these pieces intended to reflect on the Russian Consul, and are they libels? As to the second piece, both the counsel for the defendant admit that it was intended to apply to that gentleman. And what is so admitted, requires no farther proof.

The first piece of evidence in relation to the application of the piece of the 1st September, 1820, is contained in the number of the "Euterpeiad," a paper which was published on the 26th of August preceding. In that is contained an article upon "Miss Enstaphieve," a daughter of the Russian Consul, relative to her extraordinary talents as a musical performer, and in reference to which article, it would seem from a postscript, this piece was written.

It appears from all the witnesses, that the Russian Consul had at that time a daughter in her twelfth year only, who was distinguished as a prodigy of musical talent, particularly for her powers of execution on the piano forte. Mr. John S. Ellery testified, that on reading the piece at the time, he instantly knew that it referred to the Russian Consul and his daughter, and that being his friend, and having taken an interest in his family from their first arrival in this country about fourteen years ago, he immediately carried the paper to him, and that it appeared deeply to wound his feelings.

BOSTON,
Jan. 1833.

The Comth
v.
Buckingham.

Mr. Bryant P. Tilden testified, that he immediately knew that the piece alluded to the Russian Consul; that there were no other father and daughter in the city at that time to whom it could refer; and that it was a subject of great conversation in the Insurance Offices here, which you know, gentlemen, are places of great resort, where news is eagerly detailed, and where an article is not the less likely to attract attention for possessing something of a domestic character. Mr. Tilden, speaking of the talents of the young lady, says, that the late Dr. Geo. K. Jackson, a most eminent professor of music in this city, would set by her for hours hearing her performance, in admiration of her powers of execution.

Similar testimony was given by Mr. William Coffin. He believed that the piece could refer to no one but the Russian Consul, from his avowed fondness for music, and from the distinguished talents of his daughter, which was a subject of much conversation at that time among musicians and amateurs.

It was attempted in the defence to show, that the publication referred to a Mr. Lewis, who, with his children, two boys and a little girl, were in this city a few years

BOSTON,
Jan. 1823.
The Com'th
v.
Buckingham.

since. Some witnesses have testified, that this gentlemen had the reputation of treating his children with severity, and that it was owing to this, that the boys had attained to considerable excellence on the piano forte. If this were true, gentlemen, it would be nothing surprising, as we know it is almost impossible to secure the attention of children, and that they should attain to great accuracy in any literary or scientific pursuit without perpetual watchfulness, and the occasional application of severity. I have known some rare exceptions to this rule. But the celebrated Dr. Johnson acknowledged that he was indebted for his accuracy in the languages to the severity of his masters.

Mr. John Dodd, who was examined as a witness for the defendant, testified, that the daughter of Mr. Lewis never appeared in public; that the performances of the boys were remarkable for children; but that they were not equal to Christiana's, or what would be deemed rare or excellent in a professor. He farther testified that Mr. Lewis with his family left Boston some time in the year 1820, and that on reading the piece, he did not think it could refer to him and his children.

Messrs. Ellery, Tilden, and Dodd all agree in the fact, that the Russian Consul is a tender father, and passionately fond of his daughter, as well as proud of her accomplishments. And hence the eloquent counsel for the defendant raise an argument, that this piece could not be intended to refer to him. But, gentlemen, if from the evidence you believe that the piece was intended to refer to him and his daughter, then this fact would tend to show the *disposition* of its author, and you may fairly infer that he meant to wound Mr. Eustaphieve in the most susceptible point. For if he is an indulgent fa-

ther, it must wound him the more deeply to be accused of the want of natural affection. But it belongs to you to weigh all the evidence, and if you are not satisfied that the piece was meant to reflect on that gentleman, the defendant will be entitled to an acquittal.

BOSTON,
Jan. 1823.

The Com'th
v.
Beckingham.

Are the pieces complained of, libels? The first is averred to relate to the conduct of the Russian Consul as a parent towards his daughter. It says in substance, that the musical superiority of this young lady was effected by the incessant drilling of a cruel and heartless master;—that her astonishing rapidity of fingering produced no effect on the feelings, except pity for the haggard cheeks and feeble frame of the lifeless automaton;—that the parent had subjected his daughter to daily drudgery by threats, promises, and flattery, without alleviating her task by a ray of kindness or affection;—and that all the future prospects of the child were sacrificed at the altar of ambition. He concludes with invoking the indignation and contempt of an enlightened community upon the tyrant.

This paper is, in legal contemplation, a libel, because it exhibits the party intended as a heartless monster, devoid of natural affection, and sacrificing his daughter to gratify a senseless ambition;—thus containing that sort of malicious imputation which is calculated to vilify and bring a man into hatred and contempt.

Malice
may be inferred from the
publication, or

proved by extrinsic evidence. It must often be extremely difficult to produce direct evidence of a malicious design, extrinsic and independent of the publication in question; but the publication itself will often afford the most convincing proof of malice. If the words are directly calculated to slander and degrade the character, the obvious inference is, that they were designed to have this effect, unless something can be drawn from the circumstances attending the publication to repel such an inference. All the circumstances, therefore, the manner, the occasion, and the matter of the publication, are most material and important considerations. Phil. Ev. p. 106. See also vol. 1. tit. Libel. 1 Maule and Selw. 273. 282.

BOSTON,
Jan. 1823.

The Com'th.
v.
Buckingham.

Now if you believe that the defendant meant in this way to hold up the Russian Consul to the view of the public, with the malicious intent to bring upon him the hatred of the community, you will be warranted in pronouncing a verdict of guilty.

You are to judge of the motive, for there is no criminality without intention. Now, where a party has published a paper of this character of another, he is answerable for its legal effects;—"a criminal intent from doing a thing in itself criminal, without a lawful excuse, being an inference of law," unless he can negative the malicious motive. You will, therefore, next inquire whether the defendant has succeeded in this part of his defence. And here you will recollect and weigh the argument of the eloquent counsel for the defendant in this point. They have read the whole piece from which the libellous matter was extracted, and they deny it refers to any individual. They say that according to all the rules of fair criticism, it must be interpreted to relate to a *school* of musicians and performers, and not to the Russian Consul; and that it is plain that the object of the writer was to instruct, with a view to correct and improve the public taste.

Was the general object of the writer innocent and laudable? If perceiving that undue praise had been bestowed on what he deemed an improper object, and that it was likely to introduce a bad taste into the divine art of music; or that a sentiment prevailed which was calculated to injure the general education of young ladies, by taking off their attention from the useful branches of knowledge, and fixing them on the ornamental only, thus sacrificing mind to accomplishments; if you are satisfied that the general design of the writer was to discuss merely these subjects of general interest, then you

may fairly infer that his object was innocent and laudable. But if in prosecuting this his lawful object, he has maliciously strayed from it, and indulged himself in defaming the Russian Consul as a parent, then the general design of the piece will not excuse the wanton attack on the feelings and character of that gentleman.

BOSTON,
Jan. 1823.

The Com'th
v.
Buckingham.

As to the second piece complained of, I agree with the counsel for the defendant, that it is a "rude, uncouth, and indecorous piece, of which I should prefer to be the subject than the author." We look in vain to find in it any classical wit to disguise the feelings of the author towards the individual whom he meant to satirize. The whole piece has been read to you by the defendant's counsel, and you are to weigh the argument which they have made, and in which they insist that it is merely harmless wit, devoid of any malevolent design. I think, in passing judgment on it, you may fairly consider, whether you would feel wounded at finding yourselves elevated into the columns of a newspaper, to be gazed at by the passengers, and designated in the style in which it seemed good to the ingenious author of this piece, to display the life and opinions of Mr. Eustaphieve.

You are not to resort to strained rules of criticism, or to seek for the meaning of vulgar epithets, as was done with great ingenuity and effect by one of the defendant's counsel, in the almost to us unknown science of heraldry. But you are to exercise your own common sense, not imagining that because you are in a court of justice, you are to see with other eyes, or hear with other ears, or to judge with other judgment, than if you were by your own fire-side.

In this piece the author seems to delight in the figure

BOSTON,
Jan. 1823.

The Com'th

v.
Buckingham.

of the Bear, and to attach that appellation to Mr. Eustaphie. He speaks of the "sign af the Bear and Fiddle"—he speaks of the Russian Consul "as sucking a Bear," like Romulus and Remus—he speaks of "the dancing Bear"—"the polar Bear"—"the Rugged Russian Bear"—and "of a set-to between the big Bear and a Dandy." He also alludes to his employment, as being fond of music, of fishing, of writing in the newspapers; and there are some expressions of double meaning, which, if taken in their vulgar significations, are highly offensive. Now, gentlemen, weigh this in the judgment of common sense and common charity. If, on a deliberate view of it, you believe it was designed as a piece of criticism on an unfortunate author, as mere legitimate satire, with a view to correct the public taste, and to prevent the writer from indulging his vein for scribbling, it was harmless. But if, on the contrary, you believe that it was meant to represent the Russian Consul as an object of contempt and ridicule, to wound his feelings, and to sport with him in a land of strangers—then the laws of hospitality have been violated, as well as the laws of the land. For "if any man deliberately and maliciously publishes any thing in writing concerning another which renders him ridiculous, or tends to hinder mankind from associating, or having intercourse with him, it is a libel.

The jury, after being absent two hours, returned a verdict *Not Guilty* on the first count, and *Guilty* on the second.

UNITED STATES CIRCUIT COURT.

RICHMOND, (Vir.) JULY, 1819.

United States

vs.

*William Chapels, Daniel Philips,
James Thomas, Daniel Livingston,
Luke Jackson, Stephen Sydney, Pe-
ter Nelson, Isaac Sales, Peter John-
son, and Thomas Smith.*

PIRACY.

*The following preliminary remarks are explanatory of
the case.*

The constitution of the United States confers on congress the power "to *define and punish piracies and felonies committed on the high seas, and offences against the law of nations.*" Art. 1. s. 8.

"The Federalist" (No. 42) says this power "belongs with equal propriety to the general government; and is a still greater improvement on the articles of confederation. These articles contain no provision for the case of offences against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the confederacy with foreign nations. The provision of the federal articles on the subject of piracies and felonies, extends no farther than to the establishment of courts for the trials of these offences. The definition of piracies might, perhaps, without inconveniency, be left to the law of nations; though a legislative definition of them is found in most municipal codes."

Construction of the "act to protect the commerce of the United States, and punish the crime of piracy," passed 3d of March, 1819.

The crime of piracy is defined by the law of nations with reasonable certainty. Robbery or forcible depredation upon the sea, *animo furandi*, is piracy by the law of nations and by the act of congress.

On the 30th April, 1790, congress passed "an act for the punishment of certain crimes against the United States," (among others, the crime of piracy,) the 8th sec. of which is in these words:

"And be it enacted, That if any person or persons

RICHMOND, shall commit upon the high seas, or in any river, haven,
July, 1819. basin, or bay, out of the jurisdiction of any particular state,
 ~~~~~ murder or robbery, or any other offence which if committed  
**United States** within the body of a county, would by the laws of the  
 v. United States be punishable with death; or if any captain  
**Chapels,** or mariner of any ship or other vessel, shall piratically and  
**and others.** feloniously run away with such ship or vessel, or any  
 goods or merchandize to the value of fifty dollars, or yield  
 up such ship or vessel voluntarily to any pirate; or if any  
 seaman shall lay violent hands upon his commander,  
 thereby to hinder and prevent his fighting in defence of  
 his ship or goods committed to his trust, or shall make a  
 revolt in the ship; every such offender shall be deemed,  
 taken and adjudged to be a pirate and felon, and being  
 thereof convicted, shall suffer death: and the trial of  
 crimes committed on the high seas, or in any place out of  
 the jurisdiction of any particular state, shall be in the dis-  
 trict where the offender is apprehended, or into which he  
 may first be brought."

At the February term of the supreme court of the United States, 1818, however, there came on the case of the United States v. Palmer et al., certified from the circuit court for the Massachusetts district. Palmer and others, citizens of the United States, had gone upon the high seas, entered and robbed the *Industria Raffaeli*, a Spanish ship, of various articles. In this case, the question arose, (to use the language of the chief justice,) "whether this act extends farther than to American citizens, or to persons on board American vessels, or to offences committed against citizens of the United States. The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates,

although they may be foreigners, and may have committed no particular offence against the United States. The only question is, has the legislature enacted such a law? Do the words of the act authorize the courts of the union to inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag, nor offending particularly against them."

RICHM'ND,  
July, 1819.

United States  
v.  
Chapels  
and others.

The court finally came to the decision, that "the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging also exclusively to subjects of a foreign state, is *not a piracy* within the true intent and meaning of the act 'for the punishment of certain crimes against the United States,' and is not punishable in the courts of the United States."

To supply this omission, a new provision was deemed to be necessary; and it is understood, that with this intention, the last congress adopted the 5th section of the "act to protect the commerce of the United States, and punish the crime of piracy;" passed on the 3d of March, 1819. The 5th section is in these words:

"And be it further enacted, That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, *as defined by the law of nations*, and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death."

On Monday, the hall of the house of delegates was filled by a large concourse of spectators. The court was

RICHMOND, opened; the chief justice on the bench. Mr. Stanard, the United States' attorney, appeared on the part of the United States; Messrs. *A. Stevenson*, and *W. Wickham*, on the part of the prisoners; Messrs. Gilmer and Bouldin, the two other counsel whom the court had added to the defence, being prevented from attending—the first by indisposition, the last by absence.

United States  
v.  
Chapels,  
and others.

The prisoners (twenty-one in number) had been variously charged in three different indictments; one (under the act of 1819) was for robbing a Spanish vessel; another, under the same act, for robbing a Dutch vessel; the third, under the act of 1790, for robbing an *American* vessel.

Samuel Poole was first put to the bar, under the first indictment, charged with having piratically and feloniously set upon, boarded, broke, and entered "a certain Spanish vessel or brig, belonging to certain persons whose names are, as well as is that of the said brig, unknown," and robbed her of Spanish milled dollars.

The prisoner being arraigned, and the jury impanelled, seven witnesses were sworn in

## EVIDENCE.

Samuel Stanly, a youth of 18, gave a clear and particular statement of the transaction. He stated, that he had belonged to the armed vessel the *Irresistable*; that while she was lying in the port of Margaritta, about a mile from shore, about 1 o'clock in the morning, she was cut out by the crew of the privateer *Creola*. Such of the crew of the *Irresistable*, as wished to go ashore, were permitted to do so. The crew of the *Creola* said they were going to continue the cruise. They *did* go on a cruise. They went off St. Domingo, where they did but little; but off Cape Antonio, in the island of Cuba, they met with several vessels. Q. What colours did you assume? A. No particular ones; sometimes one flag, sometimes another; flags of different nations. Q. Who appointed the officers, and how? A. They were appointed by the crew of the *Creola*; (but witness could not tell particularly the manner of their appointment.) They brought to a Spanish vessel off Cape Antonio, from which they

took \$2500. During all the time of the cruise, he was on board of the *Irresistible*; towards the last of it, he was made master's mate, before which time he had been before the mast. Q. Did you board a number of vessels? A. We did. Q. Were they also plundered? A. some of them were. Q. What became of the money found in the Spanish vessel? A. It was shared among all hands. Q. Did you come into the waters of the United States, into the Chesapeake Bay? A. We did. Q. What became of the vessel? A. Com. Daniels sent down and took possession of her. Witness said the crew had abandoned and dispersed. (*One of the Jurymen.*) Was it from apprehension? A. I cannot tell that. Being asked to specify the different flags under which they had sailed, he mentioned the Spanish, Buenos Ayrean, and English. The Buenos Ayrean flag was flying when she took the Spanish vessel.

RICHMOND,  
July, 1819.

United States  
v.  
Chapels,  
and others.

On cross examination, Stanly said that he had sailed in the *Irresistible* about six or seven months, before she was taken by the crew of the *Creola*; that she had sailed from Baltimore, to make prizes under a commission from Gen. Artigas. Q. Did you not take vessels under the flag of Buenos Ayres? A. No. Q. Did you not conceive you had a right to take them? A. No: we could have taken them many a time. Q. Would you not have taken the *Creola* if found out of port? A. No. Q. Were you not apprised of there being a war between Buenos Ayres and Gen. Artigas? A. I was—We had it in our power to take Buenos Ayrean privateers from Baltimore, but we did not attempt it. Q. While in the *Irresistible* what prizes did you make? A. A ship and schooner belonging to the Portuguese. Being interrogated farther, he stated, that when the *Irresistible* was taken at Margaritta, he was in her asleep, and so were her crew; that fifty or sixty of the crew of the *Creola* had boarded her. Q. Do you know Poole? A. Yes. Q. Did you see him that night? A. No, not till the morning. They drove us below, and we had no chance of seeing till morning. He stated that the *Irresistible* was the strongest vessel; she mounted sixteen guns; the crew of the *Creola* had boarded her with two boats. Q. Had you no sentinel? A. Yes; but all were gone asleep. Q. How did you know then you were boarded with boats? A. I heard the captain say so, as well as several of the people. Q. How many were there in the crew of the *Irresistible*? A. About 25 or 30. Q. Was the prisoner very active? A. He was. Q. Who seemed the leader among them at that time? A. Ferguson, who was afterwards appointed captain. Q. Did you observe Black? A. He was first lieutenant at first, but they broke him. Being further questioned, in a desultory way, he stated that some of the old crew of the *Irresistible* were not willing to join; that when told they might go ashore, it was too late, being as much as fifty miles from land; that in the course of the cruise, they spoke about thirty or forty vessels, English, French, American, Dutch, Danes; that they boarded an American vessel bound to St. Jago; searched her trunks and took jewelry from them. Q. When you boarded vessels, did you hear an order to take Spanish or Portuguese property, but no other? A. No. Q. But in boarding the American vessel, were orders given to respect American property? A. Yes. Upon being interrogated particularly how he came to call the vessel they took a Spanish

RICHMOND,  
July, 1819.

United States  
v.  
Chapels,  
and others.

vessel, he said she had a Spanish flag and Spanish crew. Q. Did you go on board of her? A. No; but they brought the crew on board of us to search their vessel. She was bound from Campeachy to Havana—she had four or five in her crew, besides officers and passengers; was a very small vessel. Her captain told our captain in French he was a Spaniard. The witness being interrogated, said he did not himself understand French or Spanish. Soon after he got to Baltimore, the witness said he was put in jail, and promises were held out to him that he should not be punished if he gave evidence in the case: that he was taken in the vessel in the Patuxent by the revenue cutter. His share of the money from the prize was \$29; as to the jewelry, it was set up and sold in the vessel, and the proceeds shared out, of which he received \$7 more. They had also plundered a Dutch vessel, from whom they had taken some hamper of gin; as also one of Petion's schooners, from whom they took clothes, money, watches, &c. which plunder was divided among the crew. Being asked by a jurymen, if they were to take Spanish and Portuguese property only, why they robbed the American, he replied that they robbed the passengers only of jewelry, but did not rob the vessel. Q. Was the jewelry Spanish or American property? A. I do not know. Q. Why did you take gin from the Dutch vessel? Was that a Spanish vessel? A. No: but because we wanted it.

Samuel Beaver—Was one of the crew of the Irresistable, when she was seized at Margaritta, in the month of March last; when taken, the boarding crew loosed her sails, and stood out to sea; hove to at daylight, and sent those ashore who chose to go; they said at first she was coming home to Baltimore, but they went a-cruising; she carried the Margaritta flag generally; but when boarding vessels, they used different flags; they boarded eight or ten, Dutch, French, American, two Spaniards; one a Spanish brig off Cape Antonio; took from her \$2300. From the American vessel (the Superior) they took a cask of water, and jewelry. The money they took was shared among the crew; they sold the jewelry and divided out the money. When they arrived in the Chesapeake Bay, the crew was called together, and divided; those who were for going out again, went to one part of the vessel, the rest to another; the strongest party was for coming in, and the vessel was brought into the Patuxent. Q. Had you orders to respect particular vessels? A. No; we boarded one and all. We were prepared to take specie wherever we could find it. Q. What was the station of the prisoner in the Irresistable? A. He was captain of fore-top, and master's mate.

Cross examined—He stated, that eighteen of the crew of the Irresistable were set ashore at Margaritta; that he did not try to get ashore, because he did not wish to be drowned, the boat being leaky and full of men and clothes; that he was below and drunk when the vessel was taken; that Captain Ferguson had told them at first he had a commission; but two days after he told them he had not; that after they found there was no commission, then they determined to board every thing. Q. When you went on board of a vessel, were you not told to take nothing but Spanish or Portuguese property? A. Yes; but if we saw any specie, it was ours. Q. Had you orders to take money wherever found? A. Yes.

He stated, that he was arrested in Baltimore, and was told he should get a dollar and a quarter a day while attending as a witness.

John Donald—Was one of the crew of the *Creola*; shipped at Baltimore under the Buenos Ayrean flag, for a 90 days cruise; at Margaritta the vessel was sold, and they had none to return home in, and were told the governor of Margaritta meant to press them. Captain Daniels had told some of the crew, whom he wished to enlist with him in the service of Venezuela, to which he had become attached, that if they did not join him, he would have them put into the fort, and fed on bread and water. Donald said, when he was asleep below, one of the crew of the *Creola*, who rose upon the vessel, came down to his berth, and threatened to blow out his brains if he did not join them in going against the *Irresistible*. They went in two boats, and seized the latter vessel; secured the men, and hoisted sail. The officers of the *Creola* were confined during the mutiny. Ferguson and Black were the leaders. Ferguson was proposed on the quarter deck of the *Irresistible* as captain—no one objected, and he was appointed officer. They had boarded a Spanish vessel, with logwood on board, and took from her (as he understood) \$3700 in specie. They boarded several vessels under the Buenos Ayrean flag; came across one of Pedion's vessels, sent a boat aboard of her, took out jewelry, [there were several articles of it on the table of the court]—understood that this vessel was a pirate, and had no papers. They paid for the water taken from the American vessel, but does not know whether they paid for onions taken from the Dutchman. Q. You never thought of putting a prize-master on board of any of the vessels you saw? A. No; we would not have disturbed the vessel.—Being cross-examined, said there were orders to respect American property, and only to take Spanish and Portuguese.

John M'Fadden—Was first lieutenant on board the *Creola* when she was seized; gave the particulars of that transaction; on the 24th of March the mutiny took place; they seized all the small arms; threatened to blow out the brains of the officer on deck. M'Fadden was below; when he went on deck, he found fifty men armed, tried to pacify and quell them; they said they were not going to take our brig, but captain Daniels', ours not sailing fast enough; he thought at one moment he should have quelled the mutiny, but Black told them they would be strung on the beach and hung like dogs; they then sung out, "as we have begun, let us go through with it;" they took all the small arms from the *Creola*; they said all might stay who chose; they wished none but volunteers; only four or five remained behind; captain Daniels' other vessel tried to pursue the *Irresistible* next morning, then in sight (about 20 miles off) from the mast head.

Being further interrogated, said the *Creola* had a commission from Buenos Ayres; she was regularly commissioned; the crew shipped at Baltimore; cruise was finished at Margaritta. They did not think themselves authorized to take a vessel under the Artigas flag; on the contrary; he had known the two flags cruise together.—*Mr. Stanard*—Q. Does not the commission expressly restrict you from taking South American Spanish property? A. Yes; it is against the property of the subjects of the king of Spain.

RICHMOND,  
July, 1819.

United States  
v.  
Chapela,  
and others.

RICHMOND,  
July, 1819.

United States  
v.  
Chapels,  
and others.

Henry Child—Had been the first officer of the *Irresistable*; was below when the *Creola's* crew came on board; he attempted to go up with the cullass, but was taken and confined; they told him, as soon as things were arranged, they would give him the boat, and let him go ashore. Word was passed fore and aft for every one who wished to leave the vessel to go in the boat; he and nineteen men left it; the boat was in a leaky condition—much baggage in it, but had any more been willing to go with him, the baggage would have been thrown overboard. They overhauled his and captain Daniels' trunks for the vessel's commission, but finding none, Ferguson said he could easily make papers for himself. When the *Irresistable* first arrived at Margaritta, the captain had taken all the papers on shore, to deposit them at the government house.

Captain Paul—Was the commander of the *Creola*; was asleep in the cabin when the alarm was given; was suffered to go to the upper step of the gangway; was told they did not intend to injure his vessel, but to take possession of the *Irresistable*; after leaving his vessel, he had fired at them; then went on board captain Daniels' other vessel, which chased them eight hours in vain. Captain Paul being asked the date of his commission, said the original had been sent to Buenos Ayres, but a copy he had of it bore date in September, 1814. It did not justify him in taking any but Spanish property.

Captain Daniels—Was the commander of the *Irresistable*; after the alarm was given, he was ordered by the governor to pursue her, but to no purpose; her boat returned to shore with twenty officers and men. The *Irresistable* had been engaged by the governor to sail to Venezuela in two days.

The evidence being gone through, the court directed the jury to be kept together, and adjourned till next morning.

On Tuesday morning the argument commenced. Mr. *Stanard* addressed the jury about an hour. On the part of the prisoner, Mr. *Wickham* spoke about half an hour, and Mr. *Stevenson* about an hour. Mr. *Stanard* closed on the part of the United States.

The counsel on the part of the United States laid down the law, and analyzed the evidence; he called upon the jury, among other things, to lend their aid in cutting down that system of brigandage which was tarnishing the reputation of our country, and demoralizing our seamen. He cited the following passage

from Bynkershoeck, to show what was piracy as defined by the laws of nations : RICHMOND,  
July, 1819.

“ We call *pirates* and *plunderers* those who, without the authorization of any sovereign, commit depredations by sea or land,” &c. &c. United States  
v.  
Chapels,  
and others.

The counsel on the other side contended, that the words of the act of congress were too vague and loose to authorize the jury to dip their hands in the blood of a fellow citizen ; that piracy was a general term, not clearly nor sufficiently defined in the laws of nations ; that the great father of the church, to whom you would look for a definition, gave no satisfaction upon it. What says Grotius ? Not one syllable. Puffendorf ? Profoundly silent. What Barbeyrac ? Domat ? Rutherford ? Montesquieu ? Wolfius ? Vattel ? Not a solitary word by way of definition : and the reason was, that it had been left to the municipal laws of different countries to define it, and, therefore, the law of nations had not. We have only the definition of one Dutchman, Bynkershoeck ; and even with that his commentator, Du Ponceau, had expressed his dissatisfaction. And yet the jury were to say upon their oaths that piracy had been defined by the law of nations. Why did not congress do their duty, in the exercise of their constitutional powers, and make a rule which might be understood by the judiciary of the country ? If they had failed in doing their duty, it was their own look out ; but surely no jury would take upon themselves to say, by their verdict, the law had been defined, when it was not ; or upon such vague, general expressions, take the life of a fellow citizen. The counsel, by way of analogy, attempted to show that if congress had referred to other cases as defined by the law of nations, as territorial jurisdiction, the right of search,

RICHMOND, &c., how discordant the writers, and how unsettled the doctrines are upon the subject. Men, too, highly distinguished in this country, had differed upon the definition of piracy. The gentleman who presided in that court, had, in another place, (in congress,) in the case of Jonathan Robbins, declared that not only an actual robbery, but cruising on the high seas without a commission, and with an *intent* to rob, was piracy. Whereas now, the United States' Attorney says actual robbery is necessary to constitute the offence. Reference was also had to the constitution, by which congress is to define piracies and felonies committed on the high seas, and offences against the law of nations, to show that the former are distinguished from the latter, as if not ranked among the "offences against the law of nations." The evidence was then analyzed, and commented on.—It was the testimony of accomplices, (always suspicious,) and here brought from duress of a jail, taking its colour from the hopes and fears of the witnesses. It was attempted to be proven that they had contradicted themselves, and each other—that there was no satisfactory evidence of this being a Spanish vessel, as charged in the indictment—that this act of congress was passed but ten days before they left Margarita: they could not have known of it; and therefore it is, as to them, in the light of an *ex post facto* law, &c. &c. A particular and pathetic appeal was made in favour of Poole, who had served gallantly in the navy of his country during the late war.

Mr. Stanard replied to both gentlemen at considerable length. He denied the vagueness which was ascribed to the law of nations on the subject of piracy, and the other points touched upon. He supported the authority

of Bykershooek. Vattel, b. i. ch. 19. had denounced "all villains who by the quality and habitual frequency of their crimes, violate all public security, and declare themselves enemies of the human race. Thus pirates are brought to the gibbet by the first into whose hands they fall!" Blackstone, the Vade Mecum of all the lawyers, says, "A pirate is an enemy of the human race." Even if writers on the law of nations had adopted different definitions of piracy, where was the definition of it that would not embrace the case of these men—whose lawless depredations came up to any definition of it which had ever been given? After developing this idea with great force, and ridiculing the pretensions that had been suggested, that these men had the right, under the commission belonging to the Irresistable, to capture Spanish property, he returned to the analysis of the testimony; he showed why the testimony of accomplices should be received; otherwise the most atrocious offenses might escape with impunity. He concluded by a strong appeal to the jury in favour of the law—that the honour of our country required that the law should be put in force against brigands who not only sailed from its waters to collect plunder, but returned to them as the scene for its partition, and as a sanctuary where they expected to escape the punishment of their crimes.

RICHMOND,  
July, 1819.

United States  
v.  
Chapels,  
and others.

### CHARGE OF THE COURT.

The court then charged the jury in substance that the prisoner at the bar was indicted for cruising on the high seas without any commission, and boarding and plundering a Spanish vessel or vessels, belonging to some power to the jurors unknown, and piratically taking out of such

RICHMOND,  
July, 1819.

United States

v.  
Chapels,  
and others.

vessel a sum of money, which the crew divided among themselves. The essential objects of inquiry were, whether the prisoner at the bar was engaged in such cruise without a commission; whether the robbery charged in the indictment was committed by him and others so cruising as aforesaid, and whether the fact amounted to piracy under the act of congress.

The fact of cruising and plundering the Spanish vessel was proved by the testimony of accomplices, and it was contended by the counsel for the prisoner that they were totally unworthy of credit.

It is undoubtedly true, that the testimony of accomplices is to be heard with suspicion; and if their testimony should be improbable, or contradicted by circumstances, or by other testimony, the jury might justifiably discredit it; but if all the circumstances of the case—circumstances which could not be mistaken or misrepresented, corroborated the testimony of the accomplice, and in fact were merely connected by that testimony, it would be going too far to say that the facts supplied by the witness were to be disregarded because he was an accomplice. But in this case, one of the witnesses, Donald, had been acquitted by the grand jury, because he was forced on board the vessel, and his testimony concurred with that of the other witnesses in all that was material.

If the robbery was committed, their next inquiry would be, whether the vessel committing it, sailed under a lawful commission.

There was not only no testimony whatever of a commission, but all the facts given in evidence were totally incompatible with the idea of sailing under any authority whatever. The crew of one vessel had mutinied, seized

another vessel, and proceeded on a cruise under officers elected by themselves. RICHMOND,  
July, 1819.

The question whether the case came within the act of congress, was one of more difficulty. It was impossible that the act could apply to any case if not to this. The case was undoubtedly piracy according to the understanding and practice of all nations. It was a case in which all nations surrendered their subjects to the punishment which any government might inflict upon them, and one in which all admitted the right of each to take and exercise jurisdiction. Yet the standard referred to by the act of congress, as expressed in that act, must be admitted to be so vague as to allow of some doubt. The writers on the laws of nations give us no definition of the crime of piracy. Under the doubts arising from this circumstance, the court recommended it to the jury to find a special verdict, which might submit the law to the more deliberate consideration of the court.

United States  
v.  
Chapels  
and others.

The jury retired but for a few moments, and brought in a special verdict.

A jury was then impanelled, and the case of ten others of the crew (charged in the same indictment) was, with their consent, submitted at once to trial; the evidence gone through, and the jury returned the following special verdict:

We of the jury find that the prisoners, Bailey Duffey, William Chappels, alias William Chappel, Daniel Phillips, James Thomas, alias James West, Daniel Livingston, Luke Jackson, Stephen Sydney, Peter Nelson, Isaac Sales, and Peter Johnson, were, in the month of March, 1819, part of the crew of a private armed vessel called the Creola, (commissioned by the government of Buenos Ayres, a colony then at war with Spain,) lying in the

RICHMOND,  
July, 1819.

United States  
v.  
Chapels,  
and others.

port of Margaritta ; that in the month of March, 1819, the said prisoners and others of the crew mutinied, confined their officers, left the vessel, and, in the said port of Margaritta, seized by violence a vessel called the Irresistable, a private armed vessel lying in that port, commissioned by the government of Artigas, who was also at war with Spain ; that the said prisoners and others having so possessed themselves of the said vessel, the Irresistable, appointed their officers, proceeded to sea on a cruise without any document or commission whatever, and while on that cruise, in the month of April, 1819, on the high seas, committed the offence charged in the indictment, by the plunder and robbery of the Spanish vessel therein mentioned. If the plunder and robbery aforesaid be piracy under the act of the congress of the United States, entitled, " an act to protect the commerce of the United States, and punish the crime of piracy," then we find the said prisoners severally and respectively guilty. If the plunder and robbery above stated, be not piracy under the said act of congress, then we find them not guilty.

JOHN C. GAMBLE, *Foreman*.

The court then adjourned.

## SUPREME COURT, U. S.

February Term, 1820.

This case was argued before the Supreme Court at this term by the Attorney General for the U. S. and Mr. Webster for the Prisoners.

Mr. Justice Story delivered the opinion of the Court. The act of congress upon which this indictment is founded provides, " that if any person or persons whatsoever shall,

upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in the United States, every such offender or offenders shall, upon conviction thereof, &c. be punished with death."

RICHMOND,  
July, 1819.

United States  
v.  
Chapels,  
and others.

The first point made at the bar is, whether this enactment be a constitutional exercise of the authority delegated to congress upon the subject of piracies. The constitution declares that Congress shall have power "to define and punish piracies as felonies committed on the high seas, and offences against the law of nations." The argument which has been urged in behalf of the prisoners is, that congress is bound to define in terms the offence of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. If the argument be well founded, it seems admitted by the counsel, that it equally applies to the 8th sec. of the act of congress of 1790. ch. 9., which declares that robbery and murder committed on the high seas shall be deemed piracy; and yet, notwithstanding a series of contested adjudications on this section, no doubt has hitherto been breathed of its conformity to the constitution.

In our judgment the construction contended for proceeds upon too narrow a view of the language of the constitution. The power given to congress is not merely "to define and punish piracies;" if it were, the words "to define" would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime. And it has been justly observed, in a celebrated commentary, that the definition of piracies might have been left without inconvenience to the law of nations, though a legislative definition of them is to be found in most municipal codes. But the power is also given "to define and punish felonies on the high seas, and offences against the law of nations." The term "felonies," has been supposed, in

RICHMOND,  
July, 1819

United States  
v.  
Chapels,  
and others.

the same work, not to have a very exact and determinate meaning in relation to offences at the common law committed within the body of a county. However this may be, in relation to offences on the high seas, it is necessarily somewhat indeterminate, since the term is not used in the criminal jurisprudence of the admiralty in the technical sense of the common law. Offences, too, against the law of nations, cannot with any accuracy be said to be completely ascertained and defined in any public code recognized by the common consent of nations. In respect, therefore, as well to felonies on the high seas, as to offences against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish : and there is not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question.

But supposing congress were bound, in all the cases included in the clause under consideration, to define the offence, still there is nothing which restricts it to a mere logical enumeration in detail of all the facts constituting the offence. Congress may as well define by using a term of a known determinate meaning, as by an express enumeration of all the particulars included in that term. That is certain which by necessary reference is made certain. When the act of 1790 declares, that any person who shall commit the crime of robbery or murder on the high seas, shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law. In fact, by such a reference the definitions are necessarily included, as much as if they stood in the text of the act. In respect to murder, where "malice aforethought" is of the essence of the offence, even if the common law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of "malice aforethought" would

remain to be gathered from the common law. There would then be no end to our difficulties, or our definitions, for each would involve some terms which might still require some new explanation. Such a construction of the constitution is, therefore, wholly inadmissible. To define piracies, in the sense of the constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name, and determinate extent, or by enumerating the acts in detail upon which the punishment is inflicted.

It is next to be considered whether the crime of piracy is defined by the law of nations with reasonable certainty. What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law, or by the general usage and practice of nations, or by judicial decisions recognizing and enforcing the law. There is scarcely a writer on the law of nations who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions in other respects, all writers concur in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. The same doctrine is held by all the great writers on maritime law in terms that admit of no reasonable doubt. The common law, too, recognizes and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations, (which is part of the common law,) as an offence against the universal law of society, a pirate being deemed an enemy of the human race. Indeed, until the statute of 28 Hen. 8. ch. 15. piracy was punishable in England only in the admiralty, as a civil law offence; and that statute, in changing the jurisdiction, has been universally admitted not to have changed the nature of the offence. Sir Charles Hedges, in his charge at the Admiralty Sessions, in the case of *Rex v. Dawson*, 5 State Tr., de-

RICHMOND,  
July, 1819.

United States  
v.  
Chapels,  
and others.

RICHMOND,  
July, 1819.

United States

v.

Chapels,  
and others.

clared in emphatic terms, that "piracy is only a sea term for robbery; piracy being a robbery committed within the jurisdiction of the admiralty." Sir Leoline Jenkins, too, on a like occasion declared, that "a robbery, when committed upon the sea, is what we call piracy," and he cited the civil law writers in proof. And it is manifest from the language of Sir Wm. Blackstone, in his comments upon piracy, that he considered the common law definition as distinguishable in no essential respect from that of the law of nations. So that, when we advert to writers on the common law of nations, we shall find that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any person whatsoever with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. We have, therefore, no hesitation in declaring that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the law.

Another point has been made in this case, which is, that the special verdict does not contain sufficient facts upon which the court can pronounce that the prisoner is guilty of piracy. We are of a different opinion. The special verdict finds that the prisoner is guilty of the plunder and robbery charged in the indictment, and finds certain additional facts, from which it is most manifest that he and his associates were, at the time of committing the offence, freebooters upon the sea, not under the acknowledged authority, or deriving protection from the flag or commission of any government. If, under such circumstances, the offence be not piracy, it is difficult to conceive any which would more completely fit the definition.

## CIRCUIT COURT.

LAWRENCEBURG (Indiana), MARCH, 1820.

|                         |   |         |
|-------------------------|---|---------|
| <i>The Commonwealth</i> | } | MURDER. |
| vs.                     |   |         |
| <i>Amasa Fuller.</i>    |   |         |

Before Judge *Eggleston*.*Amos Lane* and *John Test, Esqrs.*, for the prosecution.*Charles Doweey, Joseph S. Benham, Daniel J. Caswell, William C. Drew, Samuel Q. Richardson, and Merril C. Craig, Esqrs.*, for the prisoner.The prisoner was charged with the murder of *Palmer Warren*.

## EVIDENCE.

The circumstances were briefly these:—Fuller had, for some considerable time prior to the murder of *Warren*, been attentive to a young lady, who was residing with her uncle in *Lawrenceburg*; about the last of November, 1819, Fuller left this place for *Brookville*; while there, the unfortunate deceased commenced an intimacy with the young lady to whom Fuller had been attached; their intimacy resulted in an engagement of marriage, which was to have been consummated on the fatal 10th of January, 1820. It appeared in evidence, that about the middle or last of December, Fuller, then at *Brookville*, received a letter in the hand-writing of *Warren*, and signed by the young lady, enclosing a ring, in which she renounced all feelings of attachment towards him, and returned him the ring which she had received from him in pledge; that, after the receipt of this letter, Fuller appeared gloomy and melancholy. On Friday, 7th January, he left *Brookville* on foot, and arrived in *Lawrenceburg* in the evening of that day; after changing his wet clothes (having rained) he went into the house of the young lady's uncle, next to *Mr. Coburn's* hotel, where he put up, and was there frequently between the time of his arrival and the day of the murder. Meeting *Warren* at the house, he several times attempted to quarrel with him, which *Warren* declined. On Saturday, 8th January, it appeared that Fuller borrowed a pair of pistols with the avowed design of shooting at a mark, in which amusement he requested several young men to participate; on the afternoon of that day, he asked a *Mr. Hitchcock* if he would go out and hunt with him; he replied that he would, and

LAWRENCE-  
BURG,  
March, 1820.

—  
The Com'th  
v.  
Fuller.

would go for his gun; Fuller answered, I do not hunt with guns, but with pistols. On Sunday, 9th January, Fuller seemed cool and collected, talked on various subjects with his fellow-boarders, and declared he had no pretensions to the young lady in question. On Monday morning, 10th January, he asked Mr. Hitchcock, then up in his room at the hotel, what was the best way to load a pistol, and the surest way to kill; and observed, I am afraid that this pistol has not enough powder in it; how shall I shoot it off so as not to be heard? [It must be observed that Warren's office is under the same roof with Coburn's hotel.] Fuller went down stairs, and shortly after came up, saying, I have shot it off, and no person heard me. Fuller then loaded the pistols with powder and four slugs each; Hitchcock told him he hoped he had no evil designs; Fuller replied, "I have not, but I will show you some fun." Fuller then put on a great coat, which he had borrowed from Mr. Coburn, and feeling if it had pockets, he put one pistol in each pocket of the coat, and walked down stairs, having previously asked Hitchcock if he could discover that he had pistols. It appeared further in evidence, that Fuller left the house, came back, and went out again; he was seen by Mr. Farrar, who was standing in the door of his house, next but one to Warren's office, to come out of Coburn's bar-room about a yard behind Warren, who unlocked the door of his office, and entered, followed by Fuller; in about three-fourths of a minute Mr. Farrar heard the report of a pistol in Warren's office, instantly ran there, and attempting to open the door, it was stopped by something, and, looking down, he discovered the body of Warren, lying crosswise the door. He pushed open the door, and upon entering the office, discovered Fuller standing beside the body, and the room filled with smoke and the smell of powder; Warren was not yet dead, but struggling in the last agonies. Mr. Farrar seized hold of Fuller, exclaiming, "Good heavens! Fuller, is it possible you have done this?" Fuller replied, "I am a man, and have acted the part of a man! I have been ridding the earth of a vile reptile! I glory in the deed!" The pistols were found lying on the counter in the office, one discharged of its contents, the other still charged. A writing was found on the floor, the substance of which was, that Warren, in the presence of the Almighty God, swore to renounce all pretensions to the young lady, and acknowledge himself to be a base liar and a scoundrel! Fuller said, after his arrest, that he had presented this paper to Warren, desiring him to sign it; he refused; he then offered him a pistol, bidding him defend himself like a man; this Warren also refused; and that he then shot the cowardly rascal. The body of Warren was pierced with a wound just below the pap of the left breast. It does not appear that Warren had ever taken any undue advantage of Fuller, or even spoke a disrespectful word of him to the young lady or any other person.

The authorities are collected in C. L. Cas., vol. i. p. 29, 488.

An application was made by the counsel for the prisoner to postpone the case to the next term: they filed an affidavit in the usual form, stating the absence of ma-

terial witnesses, whose attendance they expected to be able to procure at the next term of this court. After a short argument by the counsel, the court overruled the motion for a postponement, on the ground *the affidavit did not state the facts the absent witnesses were expected to prove.*

LAWRENCE  
BURG,  
March, 1830.  
The Com<sup>th</sup>  
v.  
Fuller.

Another motion was then made for continuance, by the counsel for the prisoner, on affidavit of the fact that popular prejudice ran so high that the prisoner could not have a fair trial. The opinion of the court was, that if the fact thus stated came to the knowledge of the prisoner subsequent to the former motion for a continuance, they would listen to it; but as it does not appear that it did, the motion is overruled. The defence set up on the trial was *insanity*. It, however, appeared in evidence, that the prisoner had been thought by those witnesses who had seen him, to be more gloomy and melancholy than usual, and as if something disturbed his mind; but nothing like insanity was made out. After a long and patient hearing of the testimony, which was very consistent and positive, and after an able defence by the prisoner's counsel, the jury retired, and in about two hours returned into court with a verdict of *guilty*. On Saturday morning the sentence of the court was passed by his honor Judge *Eggles-ton*, that the prisoner at the bar be remanded to his place of confinement, and be thence conducted, on Friday, 31st March, inst. to the place of execution, and be there hanged by the neck until he be dead. Fuller preserved throughout his trial, and at the time the judge pronounced to him his awful doom that his days were numbered, a stern, inflexible countenance.

See Judah's  
case, Cr. L. C.  
vol. i. p. 489.  
490. and the  
authorities  
there collect-  
ed.

He was executed.

## SUPREME COURT.

HAMPSHIRE, (Mass.) SEPT. TERM, 1816.

|                      |   |         |
|----------------------|---|---------|
| <i>The Com'th</i>    | } | MURDER. |
| vs.                  |   |         |
| <i>George Bowen.</i> |   |         |

Present—Honourable *Isaac Parker*, Chief Justice.

|                         |   |             |
|-------------------------|---|-------------|
| <i>Charles Jackson,</i> | } | Associates. |
| <i>Samuel Putnam,</i>   |   |             |

*Morton*, Attorney General, for Commonwealth.  
*Bates and Lyman*, for the Prisoner.

To counsel another to commit suicide, and he does commit it in consequence thereof, the counsellor is guilty of murder.

The presumption of law is, that criminal advice has the influence and effect intended by the adviser.

The prisoner was arraigned for the murder of Jonathan Jewett, by counselling and aiding him to hang himself in prison, to avoid the ignominy of a public execution, to which he had been sentenced for the murder of his father.

The indictment contained two counts. The first alleged that one Jonathan Jewett, in the night time of the 8th of November, 1815, at Northampton, murdered himself by hanging himself; and that the prisoner, Bowen, before the said self murder, on, &c. at, &c. feloniously, &c. did counsel, hire, persuade, and procure the said Jewett the said felony and murder of himself, to do and commit, &c.

The second count alleged that the prisoner murdered the said Jewett by hanging him, against the form of the statute, &c.

## EVIDENCE.

The facts of the case appeared as follows: Cephas Clap, the keeper of the jail in Northampton, where Jewett had been confined, said, he

had frequently heard Bowen and Jewett conversing; that Bowen would say, "If you are sentenced, you will be hung, you will then go there (alluding to the place of execution)—if you let them hang you, you are a d—d fool;—I had rather hang myself twice than be hung once." They used to talk mysteriously together; Bowen would say, "Will you do it?" Jewett would reply, "It can't be done." Answer, "It can; I would make a string of my bed-ticking, and hang myself to these grates in five minutes." Bowen was not in the same room with Jewett, but in the next department. Witness heard the advice frequently repeated; but Jewett said, Bowen could not hang himself in his room—Bowen told him not to mind what the cleagymen said, for "it was all d—d nonsense; for there was no hell—he could not die but once, and then it was all over."

HAMP-  
SHIRE,  
Sept. 1816.

The Com<sup>th</sup>  
v.  
Bowen.

Cross examined.—Talked often with Jewett about his hanging himself; told him it was as bad to take away his own life as that of another man's, and that he would then have two murders to answer for. Jewett thought it was worse; this was after Bowen's advice. Jewett would ridicule the visiting ministers behind their backs: had no more religion than a brute;—when the warrant for his death was read to him, he was rather serious, but witness soon after heard him sing a very indecent song. Bowen never saw Jewett, to the knowledge of the witness. Whitehall and Up-ham were in Bowen's room when Jewett hung himself; all the prisoners talked with him, and were all noisy; the windows of the lower story were twelve feet 4 inches apart; the partition walls were about 3 feet in thickness. Jewett was dull in conversation, in learning, and in natural capacity. Never heard Jewett say he intended to destroy himself; but one man advised him to push his head against the wall, running from one side of the cell to the other. He was found dead November 9th, 1816, hanging by a rope to the gratings of the windows, his knees resting on the floor, his head sunk about half a foot below the bottom of the windows, the rope tied in a fast knot. The rope could not have come from his bedstead, which was made entirely of boards. Don't know whence it came; it might have been given him from Bowen's apartment; he used to put his hand out of the grate, and swing a string with a weight attached to it; Jewett had a stick to catch the string; did not see such a stick after his death, and never saw a rope in Bowen's room; suspected the rope might have come from the room over Jewett's. Jewett might have concealed a cord in his bed; he always manifested much hardness of heart; spoke lightly about his coffin and his cap, in which it was intended he should be executed. He hung himself in the night. Witness heard no noise, although he went around the prison at about three o'clock.

Isaac Whitehall, sworn—Was a prisoner in the room with Bowen, who was nick-named Speaker of the House; heard Jewett say that the Hon. Mr. Bowen told him, that as he had never been at war with God, he had no peace to make with him. The sheriff came and told Bowen he would chain him in the dungeon if he did not desist from advising Jewett to hang himself, which made him quiet for a short time; but he soon became as bad as ever. Witness asked Bowen how Jewett could murder himself; he said there was a cord aloft, and he could get it well enough. Bowen would continually remind him how long he had to live, from weeks down to his days and hours. Witness was awake during the

HAMP-  
SHIRE,  
Sept. 1816.

The Com'th  
v.  
Bowen.

night Jewett hung himself, and heard him come across his cell to the wall, and ask Bowen "what o'clock?" Bowen told him "three, and you have but just thirteen hours to live."—"Well (said Jewett) I will go to pray." "That's you," replied Bowen, an expression common to him to denote pleasure. In about fifteen minutes afterwards, witness heard a noise, as if one had removed a stone in the room above; and presently a sound like that of some one choking. Ran to the window to call the jailer, but Bowen told him to hold his tongue, saying, "What in h—ll do you care for a d—d negro?"—he soon heard something like a person thumping his toes on the floor. After this, heard the jailer come to Jewett's door and call to him, but received no answer—Clap observed, "Well, I believe Jonathan (Jewett) has made away with himself;" upon which Bowen, raising himself suddenly, said, "I am as glad as if I had a hundred dollars. Now Clap and old Mattoon have lost their fees, and I have saved the country two hundred dollars sick." Witness frequently heard Bowen tell Jewett, "he never would go upon the hill, (meaning the place of execution,) to have the boys make fun of him."

Cross examined.—There was no cord, to his knowledge, conveyed from their room to Jewett's, and thinks Bowen could not have given him a rope without assistance—there was a rope in their room, which Bowen used to hide when the jailer came in, but it was larger than that which Jewett had—believes Bowen's legs were in irons the night on which the crime was committed—saw Jewett once through the wicket of his door, and afterwards saw his ghost! (Witness here details his superstitious impressions, which of course are not necessary to be repeated.) Witness used to tell Bowen that he did wrong to tell Jewett to hang himself—but never heard Jewett say he intended to do so. Used to split the boards of the bedstead to get sticks in their room. Upham said nothing during the time when the hanging took place.

John L. Partridge sworn.—Attended the jail in Mr. Clap's absence, who had requested him to listen to the conversation of the prisoner with Jewett. Frequently, every day, heard conversation between Bowen and Jewett; the former advising him to hang himself where he was, and telling him he was a d—d fool to let Mattoon come and hang him, for he could die but one death. Jewett said he would think of it, but said he had nothing to do it with. Bowen said, "I will help you all I can." In the course of conversation, Jewett said, "I had rather die honorable than kill myself here." Witness was working in that part of the jail where he could hear them as distinctly as if he had been under their window.

Ebenezer Mattoon, high Sheriff, sworn, said he threatened to confine Bowen if he did not cease to advise Jewett to destroy himself; believes he told Jewett, if he wanted to hang himself, he had better do it in his presence; and did not know but he told him he would furnish the means. Bowen did not deny having advised Jewett, but said his tongue was his own. The latter said he had no idea of killing himself, even on the evening previous to his death; but he sometimes was mute when questioned on the subject. A cod-line was found on Jewett, not sufficient to support his whole weight. Jewett appeared rather penitent on the last evening, though when his cap was tied, he treated it very lightly.

Here the evidence for government closed.

Witness for the prisoner.—N. Turner, sworn. Worked in the jail; had heard Jewett say he would disappoint the people who should come on the plain, (alluding to the place of execution;) he would invite people to come and see him hung, and when they were gone, he would say to me, "those people will be disappointed." He once mentioned he should pursue the plan of the man in Vermont, who destroyed himself in prison; but afterwards said it would be impossible to hang himself where he was. Never heard Bowen, except in an indirect way, advise Jewett to commit suicide.

Shubael Wilder said that he worked in the jail, and heard Jewett say he would not go to the place of execution. He said there were many ways to avoid it; he could get up into the window and throw himself headlong on the floor; witness told him he thought he might do it if his courage held out. He replied, "you will see what my courage will do. Never heard Bowen advise him to hang himself,

[The counsel for the prisoner here attempted to invalidate Whitehall's testimony, by proving the badness of his character. They wished to read a mittimus upon an arrest with one Upham, for passing counterfeit money; but the court decided that the reading such evidence was inadmissible.]

Elihu Sandford said he used frequently to see Jewett in confinement, and he employed him to get tobacco from his friends; but they never sent any by him. He told witness last August that Gen. Mattoon should never hang him; and said he wished he would tell Ward to bring him that tobacco. Witness offered to give him some, or buy it for him, but he refused, and said he wanted that tobacco!

The defence set up by the prisoner's counsel, Messrs. *Lyman* and *Bates*, was, 1st. That Jewett's crime was felony de se, and that Bowen could not, therefore, have committed murder upon him. 2dly. That it was not clear that the prisoner's advice induced Jewett to perpetrate the felonious act. 3d. That Bowen should have been indicted as an accessory, and not a principal.

The remarks of the counsel were ingenious and eloquent, but we have no room to introduce them.

The attorney general denied the force of the legal objections, but agreed that if Bowen's advice was not the procuring cause of Jewett's death, he ought to be acquitted. He laboured, therefore, to prove this fact from the testimony which has been detailed.

*Parker, C. J.*, in charging the jury, stated that, con-

HAMP-  
SHIRE,  
Sept. 1816.  
The Com'th  
v.  
Bowen.

HAMP-  
SHIRE,  
Sept. 1816.

~  
The Com<sup>th</sup>.

v.

Bowen.

sidering the similarity between the nature of suicide and the murder of another, and the consistency and uniformity of writers and principles on this particular species of murder, if the jury should find the facts as alleged in the indictment, they might safely pronounce the prisoner guilty. The important fact to be inquired into was, whether the prisoner was instrumental in the death of Jewett, by advice or otherwise. [Here his honour recapitulated the evidence.] The question then, is, did this advice procure the death of Jewett?

The government is not bound to prove that Jewett would not have hung himself had Bowen's counsel never reached his ear. The ~~very~~ act of advising to the commission of a crime is of itself unlawful. The presumption of law is, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise; as that the counsel was received with scoff, or was manifestly rejected and ridiculed at the time it was given. It was said in the argument, that Jewett's abandoned and depraved character furnishes ground to believe that he would have committed the crime without such advice from Bowen. Without doubt he was a hardened and depraved wretch. But it is in man's nature to revolt at the idea of self destruction. Where a person is predetermined upon the commission of this crime, the seasonable admonitions of a discreet and respectful friend would probably tend to overthrow his determination. On the other hand, the counsel of an unprincipled wretch, stating the heroism and courage the self-murderer displays, might induce, encourage, and fix the attention, and ultimately procure the perpetration of the dreadful deed. And if other men would be influenced by such advice, the presumption is, that Jewett was

so influenced. He might have been influenced by many powerful motives to destroy himself. Still the inducements might have been insufficient to procure the actual commission of the act, and one word of additional advice might have turned the scale.

If you are satisfied that Jewett, previously to any acquaintance or conversation with the prisoner, had determined within himself, that his own hand should terminate his existence, and that he esteemed the conversation with the prisoner so far as it affected himself as mere idle talk, let your verdict say so. But if you find the prisoner encouraged, and keep alive motives previously existing in Jewett's mind, and suggested others to augment their influence, you will decide accordingly.

It may be thought singular and unjust, that the life of a man should be forfeited merely because he has been instrumental in procuring the murder of a culprit within a few hours of death by the sentence of the law. But the community has an interest in the public execution of criminals; and to take such an one out of the reach of the law is no trivial offence. Farther; there is no period of human life which is not precious as a season of repentance. The culprit, though under sentence of death, is cheered by hope to the last moment of his existence. And you are not to consider the atrocity of the offence in the least degree diminished by the consideration that justice was thirsting for its sacrifice, and that but a small portion of Jewett's earthly existence could in any event remain to him.

The jury found the prisoner *Not Guilty*.

HAMP-  
SHIRE.  
Sept, 1816.

The Com'th  
v.  
Bowen.

Independent of the reasons of his honour the chief justice, I have not been able to find a single authority in the whole range of criminal law to support this decision but the case in Ke-lyng's Rep. 52, and 4 Bl. Com. 188. The words in Blackstone are, "If one persuade another to kill himself, and he does so, the adviser is guilty of murder."

## CIRCUIT COURT.

NEW YORK, JULY, 1818.

|                                                                                              |   |                      |
|----------------------------------------------------------------------------------------------|---|----------------------|
| <i>The United States</i><br>vs.<br><i>Capt. Skinner, Don Manuel Aguirre, and Mr. Delano.</i> | } | MOTION TO DISCHARGE. |
|----------------------------------------------------------------------------------------------|---|----------------------|

*Emmett, Wells, and Stoughton, Esqrs.* for the prosecution.

*Hoffman, D. B. Ogden, Burr, and Palmer, Esqrs.* for the defendant.

Construction of the statute relating to "fitting out or arming vessels to be employed in the service of some foreign prince," &c.

The facts of this case appeared as follows:—Judge Livingston issued warrants against Captain Skinner, Don Manuel H. Aguirre, and Mr. Delano, for "knowingly being concerned in the furnishing, fitting out, or arming, in the port of New York, two ships, called the *Curiazo* and *Horatio*, with the intent that they should be employed in the service of some foreign prince or people, to cruise or commit hostilities against the subjects of some other foreign prince or state, with whom the United States are at peace."

These warrants were issued under the third section of the act passed at the last session of congress, "for the punishment of certain crimes against the United States," and which is in the words following :

"Sect. 3. *And be it further enacted*, That if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the

furnishing, fitting out, or arming, of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property, of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States." L. U. S. vol. ii. p. 426.

N<sup>W</sup> YORK,  
July, 1818.  
United States  
v.  
Skinner  
and others.

The counsel for the defendants moved to have their clients discharged altogether; or if held to bail, they insisted that they should, under all the circumstances of the case, be recognized to appear at the next term of the Circuit Court, in a very small sum. This motion was made on three grounds:

1. That as the prosecution had been commenced without any directions on the part of the government, or application by the district attorney, it was irregular in its inception, and ought to be immediately discontinued.

2. That Mr. Aguirre, (to whose case alone this ground applied,) was a minister from the government of Buenos Ayres to that of the United States, and could not, therefore, be proceeded against in this way.

NEW YORK,  
July, 1818.

United States

v.  
Skinner  
and others.

3. That to constitute an offence against the third section of this act, the vessels must not only have been fitted out with intent to be thus employed, but *actually armed* for that purpose; and many depositions were produced, proving that neither of the vessels were or ever had been armed.

After an argument of these points by the respective counsel, Judge Livingston decided, 1st. That no instruc-

No instructions are necessary by the government to authorize issuing a warrant under the act relating to fitting out and arming of any ship or vessel." Any individual may complain, and it is the duty of the judge to issue a warrant.

To justify the meaning of the law, the vessel must be armed as well as fitted out.

tions were necessary on the part of the president, or any other officer of government, to justify the issuing a warrant for the violation of this or any other law; nor had the president any right to interfere with the proceedings which had been commenced in this case, by giving any instructions to him on the subject. Nor was it necessary that the application for a warrant should be made by the district attorney; as any individual might complain of the infraction of a law, and he considered it his duty to award a warrant whenever complaint was made to him on oath of a crime's being committed, whether such warrant were applied for by the district attorney or any other person. 2d. As to any privilege which Mr. Aguirre's commission conferred on him, the judge was of opinion, that this gentleman, not being accredited by the president, and the independence of Buenos Ayres not being acknowledged by the government of the United States, he was liable to be proceeded against for any offence which he might commit against our laws, in the same way as any other individual. On the 3d point, the judge thought no offence could be committed against the third section of this act, unless the vessel was *armed*, as well as fitted out with intent to be employed, &c. That it does not appear by any part of the act that congress intended to prohibit the citizens of the United States from building

vessels and selling them to either of the belligerents, so long as they were not armed. In the case of a principal, it was clearly necessary, by the very terms of the law, to render him criminal, that the vessel should be fitted out *and* armed. Those, therefore, who were knowingly concerned in the furnishing, fitting out, *or* arming of such ship or vessel, must also be considered as innocent, until an actual armament took place, or this absurdity would result, that one man might have a vessel built and fitted out for this purpose without being guilty of any offence, while the whole penalty of the law might be incurred by a person who should furnish her with a single suit of sails, or a cable. As it respected the evidence of an armament, the depositions on which the warrants had issued, were not only either altogether silent, or quite insufficient to prove the fact; but those on the part of the defendants established, beyond controversy, that neither of the vessels, although no doubt built for warlike purposes, had ever been armed.

Judge Livingston was therefore of opinion, that neither of the parties arrested had committed any offence, and ordered them all to be discharged.

N<sup>W</sup> YORK,  
July, 1818.

United States  
v.  
Skinner  
and others.

## QUARTER SESSIONS.

ADAMS COUNTY, (Penn.) 1802.

Present—*Hamilton*, President.

|                  |               |
|------------------|---------------|
| <i>Scott,</i>    | } Associates. |
| <i>Shaeffer,</i> |               |

|                                                |                              |
|------------------------------------------------|------------------------------|
| <i>Commonwealth</i>                            | } RIOT. ASSAULT AND BATTERY. |
| vs.                                            |                              |
| <i>Christian Arndt and<br/>several others.</i> |                              |

All denomi- In this case it appears that a number of those religious  
 nations of wor- people called "*Albrights*," (who agree in doctrine with,  
 shippers of Al- but differ in discipline from, the Methodist Episcopal  
 mighty God, Church,) had assembled at the house of a Mr. Bender, a  
 whose doc- member of that society, for the purpose of religious wor-  
 trine and ship. The defendants also assembled there, and commit-  
 mode of wor- ed several acts of improper conduct in and about the  
 ship are not ed house, such as disputing with, and contradicting the  
 subversive of morality, are preachers, using opprobrious language, and finally beating  
 to be protect- ed in this them. This being a case involving the question, not  
 ed in this country. whether the "*Albrights*" are perfectly right in their doc-  
 country. trine and discipline, but whether any people, any sect and  
 denomination of Christians, have a right under our law and  
 constitution to "assemble and meet together," and wor-  
 ship God without molestation; it excited not a little in-  
 terest. The testimony having been closed on the part of  
 the commonwealth, as well as for the defendants, Judge  
*Hamilton* delivered a very able charge to the jury; in  
 substance as follows:

"That if there be any one blessing which, more than  
 another, distinguishes this country from all others, it is

that of religious liberty ; that in other countries there is an established religion, a religion of *state*, and all others, differing from it, are either considered as heresy, and are merely tolerated, without any rights, without the hope of protection from outrage and molestation. In a word, that other countries protect one sect, and tolerate or suppress the rest, according as it may suit their prejudices, while this country gives equal protection to all ; that nevertheless, such is the proneness of our nature to oppress those who differ from us in point of religious doctrine and discipline, that sects, which have themselves been persecuted, become the most violent of persecutors in their turn, when the arm of civil authority is on their side. Civil and ecclesiastical history are full of examples. Even the celebrated Knox, the father of the Presbyterian Church, was so eager to suppress all sects not worshipping as he did, that he is said to have exclaimed, that he would not advise to wait the form of legal process, but that they should be cut off unheard and untried. That this court is not only bound to execute our laws in favour of religious liberty, but would be bound to declare unconstitutional any act made to abridge it. That the world is strangely apt to persecute any sect professing to be more rigid, and endeavoring to live a more pure life, than those about them ; that we are not to condemn, much less molest them ; we do not know but they are, as we profess to be, the sincere followers of Jesus Christ. In a word, all denominations of worshippers of Almighty God, whose doctrine and mode of worship are not subversive of morality, are to be protected in this country. That it is true, in a neighbouring state, the sect of Christians called Shaking Quakers, had ex-

ADAMS, Pa.  
1802.The Com'th  
v.  
Arndt  
and others.

ADAMS, Pa.  
1899.

The Com'rs  
v.  
Arndt  
and others.

cited the public attention of late, and it did appear that their tenets were such as tended to break down all the distinction of sex and condition; and struck at the very root of society, and were apparently subversive of civil government. But, whatever may be the effects of their tenets, we are not now called upon to give them a judicial investigation; it is clear, however, that the "Evangelical Society," or "Albrights," are not such. Their doctrine is that of the greatest portion of the Christian world. They appear to correspond with the form of Gospel Truth, &c. &c., and are, therefore, entitled to protection."\*

The jury, after a few hours deliberation, returned a verdict against three of the defendants, of guilty of assault and battery, and against four of assault only, and two they acquitted. The court sentenced Christian Arndt to pay a fine of \$30, undergo an imprisonment of three weeks, and pay the costs of prosecution. The others were sentenced to fine and imprisonment, or fine only, together with costs, according to the greater or less degree of crime they appeared to have committed.

\*NOTE.—In this country, where the utmost latitude is allowed in religious opinions and modes of worship by the constitution of the United States, and of the states respectively, it might reasonably be expected that every one would see and feel the necessity of that forbearance which provisions of such a salutary nature are calculated to produce. The expectation, however, has not perhaps been realized.—"Somebody must be persecuted when all are persecutors."

In this country we not only enjoy a greater share of religious liberty than in any other, but we are absolutely free;

nor can it be otherwise whilst the constitution of the United States retains its present form, nor even after that instrument is impaired or destroyed ; for so careful have we been upon this subject, that religious liberty has been carried into, and is made a fundamental principle of the constitutions of the respective states.

ADAMS, Pa.  
1802.

The Com'th  
v.  
Arndt  
and others.

"This first good and last hope of mankind" has been protected with great care by the common law, independent of any statute. Blasphemy against God or the Christian religion is indictable at common law. 1 East's P. C. 3. 2 Stra. 789. 2 Woodes, 512. And as to libels and verbal slanders upon the Trinity and the Christian religion, see 1 Stra. 416. and 2 Stra. 789. And see also the form of the indictment for those offences. 2 Chitty's C. L. 12. 3 Mod. Rep. 68. Cro. Jac. 421.

Disturbing divine service, by interrupting the minister or molesting the hearers, is an offence at *common law*, and may be punished by fine and imprisonment. See the form of indictment for interrupting the curate whilst reading divine service, 2 Chitty, 13. See, also, 1 Crim. L. Cases, 135.

John Degez was indicted at common law for disturbing the Rev. Mr. Vanvelser, the pastor of the Ebenezer Baptist Church, in the execution of his office as pastor. It appeared the defendant stood up and contradicted him in the doctrines laid down, and thereby disturbed the order of the service. It was held by his honour the Recorder that it was an offence at common law, and he was found guilty. Ante, p. 135.

All blasphemies against God, as denying his being or providence, all profane scoffing at the holy scripture, or exposing any part to contempt or ridicule ; all impositions in religion, or falsely pretending to extraordinary commissions from God, and terrifying and abusing the people with false denunciations of judgments, &c.; *all*

ADAMS, Pa.  
1802.

The Com'th  
v.  
Arndt  
and others.

*open lewdness*; and other scandalous offences of this nature, because they tend to subvert all religion and morality, which are the foundation of government, are punishable by the temporal judges with fine and imprisonment; and also such corporal infamous punishment as the court, in its discretion, shall seem meet, according to the heinousness of the crime. 1 Hawk. P. C. 5.

Blackstone enumerates the following crimes against God and religion: Apostasy, heresy, reviling the ordinances of the church, non-conformity, popery, blasphemy, swearing, witchcraft, religious impositions, simony, drunkenness, and lewdness. 4 Bl. Com. 41. Apostasy, heresy, non-conformity, popery, and simony, are not applicable to, and therefore not crimes in, the United States.

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## GENERAL SESSIONS.

NEW YORK, JANUARY, 1824.

|                       |   |                |
|-----------------------|---|----------------|
| <i>The People</i>     | } | PETIT LARCENY. |
| vs.                   |   |                |
| <i>John Robinson.</i> |   |                |

Present—Honourable *Richard Riker*, Recorder.

*Maxwell*, District Attorney, Counsel for The People.

*Phœnix*, Counsel for the Prisoner.

Mr. *Maxwell* called a number of witnesses to prove the felony, and then offered to read the examination of the prisoner taken before the committing magistrate, and called Mr. *Hatfield* to prove the handwriting of the magistrate.

*Phœnix* objected, and insisted that the magistrate

himself must be called to prove examination was taken according to law. N<sup>W</sup> YORK,  
Jan. 1894.

- *Maxwell* replied that proof of the handwriting of the magistrate who took the examination had always, in this court, been deemed sufficient, and that might be proved by any person acquainted with his handwriting.

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The People  
v.  
Robinson.

The court decided that where objections were made to the regularity of the examination, it was necessary to produce the magistrate who took it, or his clerk.

NOTE.—It is the practice in the New-York Sessions for the district attorney (whose humanity is as conspicuous as his acknowledged talents) to withhold the examination of prisoners upon their trial, when he thinks the statement therein would operate in their favor, and that upon the ground, that reading the examination in some cases would give the prisoner an opportunity to exculpate himself by his own evidence, and the court I believe has so decided in more than one instance.

It appears to me to be a very hard case that a prisoner may be examined for the purpose of securing evidence to be used upon his trial, and that evidence withheld at the option of his prosecutor. Why is he examined? Is it for the exclusive benefit of the state? Certainly not. All the English authorities go upon the principle that the examination is taken for *his benefit*. It is said the examination has been considered rather as a privilege in favour of the party accused *afforded by law* for the benefit of an innocent man, who perhaps may on examination clear himself from suspicion, and then he will immediately regain his freedom, than as any additional peril. 1 Chitty's Cr. L. 68. And another fact, from which an argument might be drawn to show the examination should be read in evidence upon the trial when demanded by the prisoner is, that if the prisoner

N<sup>W</sup> YORK,  
Jan. 1824.

The People  
-v.  
Robinson.

insist upon it the magistrate is *compelled* to take his examination. Fortes. 142. It therefore appears that it is for the prisoner's benefit, and it appears equally true, that if the examination is not read he loses the benefit of that privilege the humanity of the law has allowed him. Should not the examination, if requested, be read? and if it contains matter in favour of the prisoner, like every other species of evidence, its credibility may be judged of by the jury.

## OYER AND TERMINER.

ONEIDA COUNTY, JUNE, 1820.

*The People* }  
vs. } MURDER.  
*John Tuhi.* }

Before Chief Justice *Thompson.*

A sudden af-  
fray is no ex-  
cuse where  
the force is vi-  
olent and the  
weapon an ax.

The prisoner was indicted for the murder of his brother, Joseph Tuhi, on the 3d of May, 1820. The facts, as they appeared in the testimony, were, that the father of the deceased and the prisoner were dead, and their mother had become the wife of Gideon Harry; John lived with his mother and step father, and Joseph had for some time previous to his death, lived with his grandmother. John is about seventeen years old; Joseph was a little more than a year older, and considerably stronger than John. The last day of the last election (first of May last) Joseph came home, and Gideon, the two brothers, and their mother concluded to go to Clinton, where the election was held that day. Before they sat out they drank some whiskey, on the way some more, and more after they arrived at Clinton village. Towards evening

they sat out to return ; the mother was then drunk ; Gideon and the brothers partially intoxicated. When they arrived within about half a mile of their home, (the whole distance they went was about two miles and a half,) the brothers, who had been before, returned to Gideon and their mother, and John said that Joseph had dunned him for three cents which he owed him, and threatened to whip him if he did not pay him. Gideon tried to pacify Joseph, and went with John into a house on the road to borrow the money to pay the debt, but did not succeed. Some hard words were used by Joseph, but nothing more occurred between the brothers on that subject. About half an hour after, they arrived at home ; Gideon and his wife went out of the house, a little distance from the door, and left Joseph and John sitting near the fire. There was no other person in the house, and there was an ax not far from John ; the distance between the brothers was six or eight feet. Directly after they had left the house, Gideon heard a noise like scuffling and the falling of chairs, but no voice. He went in, and found Joseph lying upon the floor near where John sat, and John in the act of striking his head with the ax. The four remained in the house until morning. The mother (too drunk to know or do any thing,) and John slept, Gideon sat up and took care of Joseph, and went early in the morning to procure medical assistance. The mother and John took care of Joseph while he was gone. The wounds were found to be mortal, and no surgical operation was attempted. Joseph died on the morning of the 3d of May. He had four deep wounds upon his head, one over one of his eyes, and the others on the top and back of his head. John did not attempt to escape ; was taken into custody by the Indians, and delivered by them to the officer who went to arrest him. After Joseph was

ONEIDA  
COUNTY,  
June, 1890.

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The People
v.
Tuhi.

ONEIDA
COUNTY,
June, 1820.

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The People
v.
Tubi.

dead he seemed much affected, said he supposed he had killed him, but did not know it. The principal witnesses were Gideon and the mother, both of whom testified with remarkable candour, firmness, impartiality, and considerable intelligence. The counsel for the prisoner made an able and ingenious defence; they contended, that the facts justified the inference, that the assault which ended so fatally, was made by Joseph. His superior strength, the disposition he had manifested, to quarrel, his threat of chastising John if payment of the three cents were not made, the fact that he must have arisen from his seat and advanced towards John led to this conclusion. And they maintained, that if Joseph did attack John, and he, to defend himself, in the suddenness of the affray, and in the heat of blood, seized and used the ax so as to occasion the death of the assailant, the crime of which he was guilty was manslaughter, and not murder.

The Chief Justice observed, that there was much probability in the supposition that Joseph did advance towards John; and possibly with a manifest design to chastise him, but it was insisted, that as he was entirely unarmed, and John in no danger of death or enormous injury, what he did, even if for self defence, was excessive, unnecessary, and unreasonable.

His honour observed, that every killing was supposed to be felonious, and it lay upon the party charged to prove it not so. If one, with a sword drawn, makes a pass at another whose sword is undrawn, and a combat ensues, if the former be killed, it will only be manslaughter in the latter; but if the latter fall, it will be murder in the former. Kel. 61. Chit. C. L. v. iii. p. 167.—

Where the *instrument* used is such a one as might reasonably be presumed to cause death, even in a sudden affray, there the killing would be murder, as where the

See Cr. L.
Cas. vol. i. p.
266.

master struck his servant with an iron bar whereof he died, it was held murder. Kel. 64. In the case, now before the court, it was obvious the instrument used was such a one as was likely to, and actually did produce death.

It appeared by the testimony, that Joseph was entirely unarmed, and his honor gave it as his opinion, that if he had arisen from the place where he was sitting, for the purpose of chastising John, not having any weapon in his hands, and John had seized the ax and struck Joseph in the manner it appeared by the evidence he did, it would be murder, the weapon being unlawful, and the use of it, in the manner related by the witnesses, was evidence of malice. Where the weapon used is a deadly one, and the force applied such as likely to produce death, the books all agree it is murder. That the suddenness of the affray, as contended for by the counsel for the prisoner, could not avail him, where the force used by the prisoner was violent, and the weapon an ax.

The jury found the prisoner guilty of murder; and he was executed in pursuance of his sentence.

ONEIDA
COUNTY,
June, 1820.

The People
v.
Tuhi.

Provocation
is no answer
to proof of ex-
press and in-
dependent
malice. 1 East
P. B. 224.

OYER AND TERMINER.

PHILADELPHIA, MAY, 1817.

The Com'th
vs.
Lieut. Uriah P. Levy. } MISDEMEANOR.

Rush, President.

Peter A. Brown, Esq. Deputy Attorney General.

Z. Phillips and *T. Kittera, Esqs.* for the Defendant.

This was an indictment against the defendant for

PHILAD'A.
May, 1817.

The Comth
v.
Levy.

having on the 27th day of May, 1816, sent a challenge to Peter Mierken Potter to fight a duel, contrary to the act of assembly of March 31st, 1806, entitled "An act to restrain the horrid practice of duelling."

Many curious and interesting points were made and decided in the course of the trial, which will be given in their order.

A jury being called into the box, the book was handed to one of them, (Richard Palmer, Esq.) who applied to the court to excuse him from serving as a jurymen in this case, because he knew all about the case already, had conversed much on the subject, and had long ago made up his mind on it. The court referred the excuse to the attorney general and the defendant's counsel, both of whom refused to challenge the juror, and the court told him he must be sworn; he had no right to challenge himself. The juror was sworn.

The father of the deceased, P. M. Potter, was called as a witness for the prosecution, and proved that a paper called a challenge was found by him in the pocket of his son, at the time that he was brought home wounded, after the duel had taken place.

It is the practice of the Court of Sessions of New York, where a juror appears by his own answer to be biassed or prejudiced, to set him aside without the formality of a challenge.

A witness was then called to prove the handwriting of the defendant, who stated that he had seen him write his name once, and *believed* the signature to the letter to be his handwriting.—The challenge itself was not in his handwriting.

Peter A. Brown, Esq. Attorney General, then proposed to read the challenge to the jury.

Phillips and Kittera, for the defendant, objected to

Where a juror has expressed his sentiments as to the guilt or innocence of the prisoner, or has given vent to his feelings as to the result of the trial, he will be set aside by the court. 4 Harg. St. Tr. 748. Hawk. C. 2. c. 43 § 28. And a peer or lord of parliament may *challenge himself* on the trial of a commoner. Co. Lit. 156. Hawk. C. 2. c. 43. See post.

this, on the ground that there had been no legal proof of his handwriting. They contended that the mere *belief** of a witness, who had never seen the defendant write but once, was not sufficient to establish the signature to this letter to be his handwriting.

By the Court.—*Rush*, president. There has been some evidence to prove that the signature to that paper is the handwriting of the defendant; whether that evidence is sufficient to establish the fact or not, is not a question to be decided by the court, but by the jury. They are the judges of the weight of the evidence, and will, we have no doubt, decide it correctly. We are of opinion that the paper must go to the jury.

The letter was then read. It was addressed to Mr. Potter, and complained of ungentlemanly conduct on his part towards the writer, at a ball on the preceding evening, and asked for an opportunity "to punish such ungentlemanly conduct in a gentlemanly way." There was nothing in it about fighting a duel, or the use of any deadly weapons,

The attorney general then offered evidence to prove that the defendant and Mr. Potter had met on the same day that the letter was dated, went into a boat together at the point-house, crossed over to Jersey, and there fought a duel, in which Mr. P. was severely wounded, and soon afterwards died of his wounds. This evidence was objected to by the defendant's counsel, and, after argument, the court said it could not be heard :

1st. Because the transaction did not take place in the county of Philadelphia, to which the jurisdiction of the court was limited ; and,

2dly. Because it would be giving evidence of a greater crime, when the defendant was on his trial for a lesser

PHILAD'A,
May, 1817.

The Com'th
v.
Levy.

*There are a great number of cases wh're a witness need not swear *positive*; it is sufficient if he swears to the best of his *belief*. The opinion of eminent men in the sciences are instances: a physician in the case of murder, or an engraver in a case of forgery, respecting their opinion of the cause of death, and whether the instrument is a forgery or not. See 3 Willes, 497. 4 T. R. 496. 4 Esp. Rep. 117.

PHILAD'A,
May, 1817.

The Com'th
v.
Levy.

one. It would be giving evidence that the defendant had committed murder in the state of New Jersey, when he was only on his trial for having sent a challenge in the county of Philadelphia. The court said, however, that the attorney general might give evidence of that part of the transaction which took place in the county of Philadelphia.

The witnesses were called, and proved that the parties met at the point-house, and went in a boat together; that Lieut. Levy proposed to Mr. Potter to compromise their dispute, and said he would come upon any terms that a man of honour might come upon; but Mr. Potter said he would come upon no terms, but was determined to fight him.

The evidence on the part of the prosecution being closed, the defendant's counsel produced a volume of testimony to prove his amiable and inoffensive disposition, and his good conduct and excellent character both as a man and a soldier, and particularly his bravery and attention to duty in the action between the Argus and the Pelican, during the late war.

The evidence being closed on both sides, the defendant's counsel contended,

1st. That there was not sufficient evidence that the defendant ever signed a letter called a challenge.

2dly. That there was no evidence that the letter, if signed by him, was written or delivered in the city or county of Philadelphia. It was dated on board the Franklin 74, and there was no evidence that that ship lay within the county of Philadelphia at the time. The jury were bound to confine themselves to the evidence they had heard since they came into the box; they could not have found a verdict upon facts which they

of their own knowledge, much less upon the report of others before they were sworn.

PHILAD'A,
May, 1817.

The Com'th
v.
Levy.

3dly. That the letter, if signed by the defendant within the county of Philadelphia, did not amount to a challenge, within the meaning of the act of assembly. The act speaks of a challenge "to fight at sword, rapier, pistol, or any other deadly weapons," and there was not a word about deadly weapons in this letter. The letter speaks of settling a dispute in a gentlemanly manner. What the defendant meant by those words it was not for the jury to presume. They could only take the words of the letter, and compare them with the words of the act of assembly, and decide whether or not the defendant, if he had signed that letter, had brought himself within the letter of the law. The act of assembly, they said, was a highly penal statute, and the rule of law is, that penal statutes are to be construed strictly. The indictment could not be sustained unless the defendant had brought himself within the express words of the statute.

The attorney general replied with considerable argument in support of the prosecution, but with great liberality towards the defendant, and spoke of his character with great respect. He said that duelling was considered by some men as a horrid crime, while others looked upon it as an honourable way of settling disputes, one which no honourable man could refuse without an irreparable injury to his character and standing among his friends and associates. Of the latter description were the gentlemen with whom the defendant's official situation as an officer of the navy required him to associate. Whether duelling was honourable or criminal he was not prepared to say, nor was it necessary he should give any opinion on the subject at present; it was sufficient for him that the law made

PHILAD'A,
May, 1817.

The Com'th

v.
Levy.

it an indictable offence to send a challenge to fight a duel, by which it became his duty, as attorney general, to prosecute it as a crime.

Judge Rush, in his charge to the jury, told them, that in the opinion of the court, the only doubtful point in the cause was the want of satisfactory proof of the defendant's handwriting to the challenge. The evidence was not as conclusive as the court could wish; the jury were the sole judges, and would weigh it impartially, and decide as they thought right.

As to the question of the letter having been written in the county of Philadelphia, there could be no difficulty about it. It was dated on board of the Franklin 74, and it is a fact known to all the jurymen, that that ship had been built in the county of Philadelphia, and had never yet been out of it, being at this moment in the stream opposite to the navy yard, and near to the Pennsylvania shore. The jury, he said, were not bound to shut their eyes against facts that are known to all mankind. Men are not to take leave of their senses because they are sworn as jurymen.

As to the language of the letter not coming within the words of the act of assembly, it could not save the defendant. If the construction of the act, which the defendant's counsel have contended for, were to prevail, it would destroy it altogether, and completely defeat the intention of the legislature. The intention of the law was to prevent duelling; but if their construction of it be correct, it will not produce that effect at all. What do all duellists say in their challenges? Why, they inform the opposite party that they consider themselves as having been injured or insulted by him, and they expect the satisfaction of a gentleman. Now what does this

mean? Every body knows that it means, I challenge you to fight a duel with me with deadly-weapons. No man would be such a fool as to send a challenge in the words of the act of assembly.

PHILAD'A,
May, 1817.
The Com'th
v.
Levy.

The jury went out and returned in about ten minutes with a verdict of *Not Guilty*.

GENERAL SESSIONS.

NEW YORK, JANUARY, 1823.

<p><i>The People</i> vs. <i>John Tilton.</i></p>	}	FALSE PRETENCES.
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Present—Honourable *Richard Riker*, Recorder.

Marvell, District Attorney, Counsel for The People.

Price, Counsel for the Prisoner.

In this case the prisoner was indicted for obtaining from the captain of a vessel certain goods belonging to the firm of Titus & Townsend, stating that he had been sent by them for the property.

Onus probandi—on whom it lies.

Townsend was introduced and stated that he did not send for them, and that he thought it probable his partner was out of the city at the time, but could not say with certainty. The goods were never delivered to Titus and Townsend.

Price contended, in an able argument, that it was neces-

N^W YORK,
Jan. 1823.

The People
v.
Tilton.

sary that Titus should be introduced to prove that *he* did not send for them.

By the Court. It is our opinion that the evidence already introduced is *prima facie* sufficient to convict the prisoner. If he wished it to be believed that Titus sent him, he should have been introduced as a witness to that fact. We are clearly of opinion that the *onus probandi** has been cast upon him. The jury, however, are to decide this fact, as well as all other things connected with the case. If they entertain reasonable doubt whether Titus did or did not send the prisoner, it is their duty to acquit.

The jury found the prisoner *Guilty*.

*NOTE.—It is a well-settled rule of law, that the prosecutor must prove every essential averment in the indictment which enters into the substance of the charge. But the rule will be satisfied if he proves so much of the indictment as shows that the defendant has been guilty of a substantive crime. 1 Chitty's Cr. L. 558. A defendant may be found guilty upon a count in an information which charges him with having composed, printed, and published a libel, if he is proved to have *published* without any evidence that he was implicated in the *composition*. Chitty, 294, 558. 2 Camp. 584. If negative averments be introduced to show that the case is not within any of the exceptions recognized by a legislative provision, which it would be his duty to produce, as matters of defence, if he could avail himself of their benefit, there will be no necessity to support those allegations in evidence. 2 East's P. C. But when the law presumes the affirmative of any fact, the negative must be proved by the party averring it in pleading; and when any act is required to be done by one, the omission of which would make him guilty of a criminal

neglect of duty, the law presumes the affirmative, and throws the burden of proving the negative on the party who insists on it. 1 Chitty's Cr. L. 559. 3 East, 192. 3 Campb. 10. 12.

N^W YORK,
Jan. 1823.
The People
v.
Tilton.

GENERAL SESSIONS.

NEW YORK, DECEMBER, 1823.

<p><i>The People</i> vs. <i>Beau Jackson, Henry Foster, Richard Brown, and Joseph Robin.</i></p>	}	<p>GRAND LARCENY.</p>
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-Present—Honourable *Richard Riker*, Recorder.

Maxwell, District Attorney, Counsel for The People.

Price, Counsel for the Prisoner.

It appeared by the testimony of witnesses that on the night of the 16th of November, 1823, the store of Messrs. Andrew Martine & Hall, No. 147 Chatham-street, was broken open, and a quantity of merchandize was taken therefrom. Three days afterwards part of the goods aforesaid were taken by Mr. Hays from 160 Duane-street, and another part from the possession of Seth Campbell, at the corner of Hester and Christie-streets, where it was proved they had been left: the former bundle by Jackson and Robin, and the latter by Brown and Foster. They were all apprehended* by Mr. Graves, a watchman, at No. 85 Christie-street, who found upon them other property subsequently identified.

On an indictment for larceny of the goods of a firm, evidence may be given of the Christian name of one of the firm, after the counsel for the prisoner has summed up; and the to forward the end of public justice.

N^W YORK,
Dec. 1823.

The People
v.
Jackson
and others.

Mr. *Price*, their counsel, took an exception to the indictment. It charged the felony to have been committed by feloniously taking and carrying away the goods of "Andrew Martine and Edward Hall." The testimony having been received, Mr. *Price* summed up the evidence and contended that in point of fact the name "Andrew" had never been given in proof, and that it was too late to supply it now.* That it must be proved as laid; for if proved, for example, to be the property of "William" Martine, it could not sustain a verdict of guilty; and here there was a *hiatus* in the chain of testimony which it was too late to supply.

Maxwell, District Attorney, replied that Mr. *Price* was certainly mistaken; that he had proved the firm as laid in the indictment; but if he had omitted to ask the Christian name of Mr. Martine, the omission could be supplied at any time, even after the counsel had summed up.

The court were of the same opinion.

The jury requested to be informed by a witness relative to the first or Christian name of Mr. Martine. Mr. *Price* contended, toties viribus, that the admission of testimony for that purpose in this stage of the case, after the cause had been summed up, was not legal.

The objection was overruled by the court, and the question asked.

The prisoners were found guilty.

*NOTE.—The case of *The Com'th v. Tamar Johnson*, a black woman, tried before C. J. Tilghman in the Oyer and Terminer at Philadelphia, 1819, for the murder of her bastard child. The facts appeared as follows: A child was found in the sink of her necessary, which had the appearance of being strangled before it was thrown

there, and the evidence was positive that she was pregnant some time before the child was found.

N^W YORK,
Dec. 1823.

Peter A. Brown, Esq. prosecuting counsel for The Commonwealth, in his examination of the witnesses omitted to ask the colour of the child. Messrs. *Levy* and *Peters* took an advantage of this omission, and contended that it was a *white* child, and consequently could not be the child of the prisoner.

The People
v.
Jackson
and others.

After the counsel for the prisoner had summed up, Judge Tilghman called up the coroner and asked him the colour of the child, observing that if it was white there was an end to the case. The question was asked and answered without any objection being made by the counsel for the prisoner. Indeed, it would be a disgrace to the law if the acquittal of a guilty person should rest on such a slight omission not at all referable to the merits of the case.

It is observed by Mr. Christian, (4 Bl. Com. 356.) that, "the judge is counsel for the prisoner only for public justice, and to promote that object alone all his inquiries and attention ought to be directed. Upon the trial of a *male* child the counsel for the prosecution concluded his case without asking the *sex* of the child, and the judge would not permit him afterwards to call a witness to prove it, but, in consequence of the omission, he directed the jury to acquit the prisoner. But to the honor of that judge, it ought to be stated, he declared afterwards in private his regret for his conduct. This case is well remembered, but it ought never to be cited but with reprobation."

GENERAL SESSIONS.

NEW YORK, NOVEMBER, 1823.

The People
 vs.
Bleeker et al. } CONSPIRACY.

Present—the Hon. *Richard Riker*, Recorder.

Mazwell, District Attorney, Counsel for the Prosecution.

F. A. Blake and *W. M. Price*, Counsel for the Defendants.

On an indictment for a conspiracy evidence may be admitted of other acts indicative of criminal collusion with other persons to show the quonimo of the defendants in relation to the charge in the indictment. Bleeker and another were indicted for conspiracy to obtain from C. certain goods by fraudulent means. *Mazwell*, in opening the case, stated, that in addition to the acts of the defendants in the particular transaction alluded to in the indictment, he should in the course of the trial introduce evidence to show that their dealings with several other individuals had been accompanied by circumstances indicative of a criminal collusion. Such evidence was accordingly offered.

On an indictment for a conspiracy, the examination of a prisoner implicating others cannot be read upon the trial. *Blake* objected to its introduction, on the ground that to inquire into *particular crimes*, other than those charged in the indictment, was repugnant to the general principles and established rules of evidence. For such offences, he observed, the defendants are liable to future indictments; and when specific charges are regularly and legally preferred, they will meet them without fear. He insisted, that the defendants could not possibly be expected to come before the court prepared to vindicate every transaction of their lives, or to explain at the moment the occurrences of remote periods. He urged, that an unjust and cruel surprise must be the necessary and inevitable con-

sequence of the course which the district attorney proposed to adopt. N'W YORK,
Nov. 1823.

Per Cur. The rule has been well settled in this court in the Hitchcock's case, (6 C. H. R. 43,) where the same point was taken, and in the case of Alison v. Mathieu, (3 Johns. Rep. 233,) by the supreme court of the state. The evidence is inadmissible, on the ground that it is competent in cases of conspiracy, as in those of forgery, libel, and uttering base coin or forged notes, to show by other acts the *quo animo* or *scienter* of the defendants. The People
v.
Bleeker.

Maxwell farther proposed to read the examination of *Bleeker*, taken separately and apart from the other defendant, to prove the charge laid in the indictment.

Blake objected on the following grounds:—If the examination now offered were read in evidence, it must of necessity operate against *both* of the defendants, or be utterly *nugatory and irrelevant*. The defendants are not now on trial for a conspiracy in which any third person can form a party; and as no man can by himself commit the crime charged in the indictment, they must be *jointly convicted or jointly acquitted*.

Can the document offered be regarded as evidence against both? It is at most the *mere confession* of the individual under examination; and shall this be admitted to convict another? Surely not. (2 Hawk. Pl. Cr. 46. M'Nally's Evid. 40.)

It is true, the course proposed has in some instances been sanctioned in Great Britain, and confessions to which the accused had never assented, either expressly or by implication, have been admitted against him. This, however, was done by a court which was for ages the chosen instrument of royal vengeance. A court whose

N^W YORK,
Nov. 1823.

The People
v.
Bleeker.

proceedings have long been execrated and denounced even in the kingdom where it originated and flourished. A tribunal which, to use the words of Lord Clarendon, "held for honourable that which pleased, and for just that which profited." I allude to the star chamber.

I repeat it, there is no instance to be found in which the confession of one has been permitted to operate against another, except in cases where the bitter and settled animosity of the crown demanded the sacrifice of the accused, in a voice which bade defiance to the principles of truth, humanity, and justice. Such were the cases of the Earl of Essex, (1 Sta. Tr. 197,) of Sir Nicholas Throckmorton, (1 Sta. Tr. 70,) and of Sir Walter Raleigh,* (cited M'Nally's Evid. 40.) These are not such precedents as this court will treat with deference and respect, nor are they such, I trust, as the district attorney will rely on as authority. Even Great Britain, though she has not yet forgotten, in cases where the crown is a party, the lessons of oppression and violence which she learnt in days of yore, has in latter times established a principle more humane and just than the one contended for in the present instance. (Thelwell's case, M'Nally's Evid. 614.)

Price.—An examination in an instance of this kind stands on a different footing from one taken in a case of felony. The taking of the latter is authorized and provided for by statute; but this is, at most, a mere naked confession, reduced to writing, without even the solemnity of a legisla-

* On this occasion, Sir Walter with some little acrimony, but certainly with much justice, remarked of Sir Edward Coke, then attorney general, that "Mr. attorney neither behaved like a man of quality nor a man of virtue."

tive sanction. Such a paper cannot surely be read to aid the conviction, not only of the party examined, but of another individual also.

After much discussion, the evidence was overruled.—
Verdict *Not Guilty*.

N^W YORK,
Nov. 1823.

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The People  
v.  
Bleeker.

## GENERAL SESSIONS.

NEW-YORK, JANUARY, 1824.

*The People* }  
vs. } LARCENY.  
*French.* }

Present—the Hon. *Richard Riker*, Recorder.

*Maxwell*, District Attorney, Counsel for the Prosecution.

*Price*, Counsel for the Prisoner.

In this case it appeared the prisoner came into a store and told the keeper that a customer of the store had sent him for goods, and in consequence of the falsehood uttered by the prisoner, the store-keeper delivered him the goods. It was decided by the court after advisement, that where a person obtains goods under a false pretence, which false pretence is the inducement for parting with the property, such a case falling within the statute for punishing the obtaining of goods by false pretences, does not amount to a felony.

The prisoner was acquitted of the felony, but was indicted, tried, and convicted of obtaining the goods by false pretences under the statute.

This decision may have an important operation in cases of constructive larceny.

## SUPREME COURT.

RALEIGH, (N. C.) JULY, 1810.

*The State*  
 vs.  
*John Owen.* } MURDER.

In an indictment for murder the length and depth of the wound must be expressed. <sup>2</sup>  
 Hawk. b. 2, c. 33, § 81. <sup>2</sup>  
 Chitty's C. L. 488.

This case came on to be argued before the supreme court on exceptions taken to the indictment in behalf of the prisoner. The exceptions were—That the mortal wounds alleged to have occasioned the death were not *positively* alleged to have been given by the prisoner, but were only to be collected by intendment or implication; and that the length and depth of the wounds alleged were not described to be of any dimensions.

As to the first exception, the judges were unanimous that the wounds were laid to have been given by the prisoner with sufficient certainty, and of course overruled the objection: but as to the last exception the judges were divided. Judge Taylor, who delivered his opinion, (and with which Judge Locke concurred,) remarked, that in all cases where the wound was charged to have been inflicted with a *blunt* instrument, such as a cudgel or a stick, the court would construe the word "wound" to signify a *bruise*; and that inasmuch as it was admitted that in the case of a *bruise* the dimensions need not be stated, therefore in his opinion it became useless in the indictment before the court. But Judges Hall, Lowrie, and Henderson held a contrary opinion.

It was by them stated, that in a case of this kind the court had *no discretion*.—It only became necessary to examine the law upon the subject, and to ascertain there-

by whether the indictment in question contained those requisites which the *law* had declared essentially necessary. That if they had been called upon to carve out a system of jurisprudence, whether they would have required such nicety and formality they were unprepared to determine. But being required to pass upon the law as it is written, they felt themselves imperiously bound to determine thereby, disregarding any of the consequences which result from it. That authorities had been produced to the court from which it appeared that there was an uninterrupted chain of adjudication *expressly in point* from the earliest times to the present day: that in all cases of indictment for murder charged to have been committed by the giving of a wound, the nature and description of the wound should be set forth. That these authorities were fortified and supported by the books of precedents, which have *invariably* pursued this nicety, except in a very ancient collection compiled by West about two hundred years ago. That as to the cases from West, in which this formality is not observed, they were susceptible of this remark: that these precedents were in *Latin*, and that the words "*mortalem plagam*," signified either a *mortal wound*, or *mortal bruise*; but that in the case before the court the indictment was in the English language, and it had charged the murder to have been committed by a mortal *wound*. That at the time this country adopted the common law of England, (if the court were to regard authority,) this formality was required, and being so required by *law*, the court could not dispense with it.

A majority of the court, therefore, being of the latter opinion, the bill of indictment was pronounced exceptionable:

RALEIGH,  
July, 1810.

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The State  
v.  
Owen.

RALEIGH,  
July, 1810.

The State  
v.  
Owen.

consequently, upon it sentence of death cannot be passed upon the prisoner.

The keeper of the jail having received a mittimus to retain the prisoner, he will of course remain in jail until October term of the superior court, when a new bill will be drawn, and another trial will take place.

## GENERAL SESSIONS.

NEW YORK, JULY, 1810.

*The people of the State of New York*

vs.

*James Melvin, William Abernathy,  
Thomas Baker, Henry Vane, James  
Glass, Daniel Allert, John Gibson,  
Samuel Browning, Henry Bogert,  
Robert Baird, John Newland, Wil-  
liam Cosack, Robert Lambert, Ter-  
ence Murray, Patrick M'Laughlin,  
James M'Ninch, Wright M'Farland,  
William Beach, James Read, John  
Daly, Geo. Read, John Morehouse,  
John. Gillen, and Nehemiah Brad-  
ford.*

CONSPIRACY.

Present—Hon. *Jacob Radcliff*, Mayor.

*Jos. Ogden Hoffman*, Recorder.

Messrs. *Griffin and Emmet*, Counsel for the People.

Messrs. *Sampson and Colden*, Counsel for Defendants.

The defendants were indicted for a conspiracy. The indictment stated, that ;

The defendants being workmen and journeymen in the art, mystery, and manual occupation of cordwainers, on the 18th October, 1809, &c. unlawfully, perniciously, and deceitfully designing and intending to form and unite themselves into an unlawful club and combination, and to make and ordain unlawful by-laws, rules, and orders among themselves, and

thereby to govern themselves and other workmen in the said art, and unlawfully and unjustly to extort great sums of money by means thereof, on the day and year aforesaid, with force and arms, at, &c. together with divers other workmen and journeymen in the same art, &c. (whose names to the jury are yet unknown,) did unlawfully assemble and meet together, and being so, &c. did then and there, unjustly and corruptly conspire, combine, confederate, and agree together, that none of them, the said conspirators, after the said 18th October, would work for any master or person whatsoever, in the said art, mystery, and occupation, who should employ any workman or journeyman, or other person in the said art, not being a member of the said club or combination, after notice given, &c. to discharge such workman, &c. from the employ of such master, &c. to the great damage and oppression not only of their said masters, employing them in said art, &c. but also of divers other workmen and journeymen in the said art, mystery, and occupation, to the evil example, &c. and against the peace, &c.

N<sup>W</sup> YORK,  
July, 1810.

The People  
v.  
Melvin  
and others.

2d Count has the same general averments, and states, that the defendants, designing and intending to form and unite themselves into an unlawful club and combination, and to make and ordain unlawful and arbitrary by-laws, rules and orders among themselves, and thereby to govern themselves in, (as in the first count,) and unlawfully and unjustly to exact and extort great sums of money by means thereof, &c. did unlawfully assemble and meet together, and being so met together, &c. did then and there, unjustly, &c. conspire, combine, confederate, and agree, that none of the said conspirators, after the said day, &c. would work for any master or person whatsoever, in the said art, &c. who shall employ any workman, &c. who shall thereafter, infringe or break any or either of the said unlawful rules, orders, or by-laws. Concluding as above.

3d Count. That the defendants conspired, &c. not to work for any master or person who should employ any workmen, &c. who should break any of their by-laws, unless such workman, &c. should pay to the club such sum as should be agreed on, as a penalty for the breach of such unlawful rules, orders, or by-laws, and that they did, in pursuance of the said conspiracy, refuse to work and labour for James Corwin and Charles Aimes, because they, C. and A. did employ one Edward Whittess, a cordwainer, (alleging that the said E. W. had broken one of such rules and orders, and refused to pay two dollars, &c. as a penalty for breaking such rules and orders.) and continued in refusing to work, &c. for C. & A. until the said C. & A. discharged the said E. W. &c. &c.

4th Count. That they (the defendants) wickedly, and intending unjustly, unlawfully, and by indirect means, to impoverish the said Edward Whittess, and hinder him from following his trade, did confederate, conspire, &c. by wrongful and indirect means, to impoverish the said E. W. and to deprive and hinder him from following his said art, &c. and that they, according to the said unlawful, &c. conspiracy, &c. indirectly, unlawfully, &c. did prevent, &c. the said E. W. from following his said art, &c. and did greatly impoverish him.

5th Count. That the defendants did conspire and agree, by indirect means, to prejudice and impoverish the said E. W. and prevent him from exercising his trade.

NW YORK,  
July, 1810.

  
The People  
v.  
Melvin  
and others.

6th Count. That the defendants not being content to work at the usual rates and prices for which they and other workmen and journeymen were wont and accustomed to work, but falsely and fraudulently conspiring, unjustly and oppressively to augment the wages of themselves and the other workmen, &c. and unjustly to exact and extort great sums of money for their labour and hire in the said art, mystery, &c. and did meet, &c. and being so met, &c. did unjustly and corruptly conspire, &c. that none of them should, after the said 18th of October, work at any lower rate than

- \$3 75 for making every pair of back-strapped boots.
- 2 00 Suwarrow laced boots, full clammed.
- 1 75 for laced boots in front.
- 2 37½ for footing back-strap boots.
- 3 25 for footing Suwarrows.
- 1 25 for bottoming old boots.

On account of any master or employer, to the great damage not only of their said masters, &c. but of divers other citizens, &c.

7th Count. That the defendants falsely and fraudulently conspired, &c. unjustly and oppressively to increase and augment the wages of themselves and other workmen, &c., and unjustly to exact and extort great sums for their labour and hire, &c. from their masters who employ them, did assemble, and being so assembled, did conspire, &c. that they, and each of them, &c. would endeavour to prevent by threats, and other unlawful means, other artificers, &c. in the said art, &c. from working, &c. at any lower rate than, &c. (setting out the prices in the preceding count, and concluding likewise.)

8th Count states the design to form themselves into a club, as in the three first counts, and to assemble unlawfully, and that they did assemble, and being so assembled, conspired and agreed that none of them should work for any master who should have more than two apprentices, to learn the said art, at one and the same time.

9th Count charges a conspiracy, by indirect means to prejudice and impoverish the following persons, who are all master shoemakers, and prosecutors of the indictment.\*

Israel Haviland, John Mills, Timothy Wood, John Peshine, Oliver H. Taylor, William Trowd, Isaac Minard, Samuel Mabbatt, Thomas Lewis, James Corwin, John I. Vanderpool, Christian Covenhoven, William Kidney, Thomas Benton, David Law, Jun. Abraham Merrill, Charles Lee, Thomas M'Kinley, James Jarvis, Charles Aimes, William Benton, and Peter R. Spranger.

On motion of Mr. Griffin, the following witnesses were bound in recognisance to appear from day to day and testify in the cause: Lewis Judson, Lucius Benja-

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\*This was argued during the mayoralty of the Hon. De Witt Clinton, and exceptions were taken to each count in the indictment. It was drawn by an eminent criminal lawyer, and each count was sustained by the court.

min, Edward Whittess, Oliver H. Taylor, John Wilcox, Charles Aimes, Daniel Corwin, Benjamin Britain, Thomas M'Cready, Webby Slocum, William Frowd.

N<sup>W</sup> YORK,  
July, 1810.  
The People  
v.  
Melvin and  
others.

The jury precept contained twenty-four names of jurors, of whom only eighteen were summoned, the remainder being absent, or not found. And of these there did not appear a sufficient number.

The following were the jurors sworn:—David Wagstaff, John Johnson, James Welsh, William L. Lawrence, Augustus Nicoll, John Ashfield, David Cargill, John W. Livingston, William Brodill, Joseph Dederer, John Queen, Robert Graham.

As the jurors came to the book, they were asked by the defendant's counsel, whether they were master shoemaker's, and, also, whether they were masters or employers in any of the mechanic arts or trades; but none such appearing, they were all permitted to be sworn without farther objection.

A question was put to a juror by a Mr. Griffin, on behalf of the prosecution, whether *he had not made up his mind upon the subject of this trial.*\* He said he had no

\* In the case  
of Aaron Burr  
who was in-

dicted for treason, it was decided that the proper question to be put to the jurors was, "Have you *made up and delivered* the opinion that the prisoner is guilty or innocent of the charge laid in the indictment." Explanatory questions were allowed by the court, and put by the counsel for the United States, and for the prisoners when necessary. The words of the court in that case were, "that to have made up and *delivered* the opinion, that the prisoner entertained the treasonable designs with which he is charged, and that he retained those designs, and was prosecuting them when the act charged in the indictment is alleged to have been committed, is good cause of challenge." (Burr's Trial, by Robertson, vol. 1. 418.) In Callender's case, a similar question was put, the amount of which was, "Have you made up and *delivered* the opinion, that the prisoner has been guilty of publishing a false, wicked, and malicious libel which subjects him to punishment, under the act of congress on which he is indicted." In Selfridge's case, the following questions were put to the jurors: 1st. "Have you heard any thing in this case so as to have made up your mind?" 2d. "Do you feel any bias or prejudice in this case for or against the prisoner at the bar?" The same questions were put to, and answered by, the jurors in Goodwin's case. On the trial of the mail robbers, Hare and Alexander, in the Circuit Court of the United States, May Term, 1818, Baltimore, each juror was asked whether he had formed and *expressed* an opinion of the guilt or innocence of the prisoner.

NEW YORK,  
July, 1810.

The People  
v.  
Melvin and  
others.

knowledge of the particulars of this case, and therefore could not have made up his mind. Upon this Mr. John Johnson, another of the jurors, observed that he had so far made up his mind, that he could see no reason why journeymen should not meet to regulate their own demands as well as other men. This declaration was made a ground of challenge for favor by the prosecutors' counsel, and the three jurors first sworn, viz. James Welsh, John Ashfield, and David Cargill, were sworn, to try whether the said John Johnson was an indifferent juror between the parties or not.

David Codwise, Esq., counsellor at law, having been seated opposite the jury box, was called and sworn to testify to the words of Mr. Johnson. The prosecutors, however, withdrew the challenge, and the juror was sworn.

Mr. Queen was also challenged, for favour, and examined on his *voire dire*. The ground of challenge to Mr. Queen was, that his brother, who was now absent from this city, had been, during his residence here, about six months ago, a member of the Society of Journeymen Cordwainers, and that he might still be understood to be a member; if so, the penalties would fall upon him, provided the acts of that body were held to amount to a conspiracy, and for that reason his brother could not be an impartial juror. The same triors were sworn. Mr. Queen was examined on his *voire dire*. Two witnesses, Thomas Wilson and George Gould, were examined in chief. The counsel summed up the evidence, and the triors found Mr. Queen an indifferent juror between the parties: he was accordingly sworn.

The court imposed fines on several persons summoned as jurors, for their non-attendance, and adjourned the

trial of the indictment till 10 o'clock on the following day. NEW YORK,  
July, 1810.

The jury sworn were permitted to go at large\* by consent of the parties; the court first admonishing them of their duties, and of the necessity of shutting their ears to all conversations touching the subject they were sworn to determine upon.

The People  
v.  
Melvin and  
others.

\*In Fries' case, which was for treason, the jury rode into the country with an officer during the trial.

On the part of the prosecution, the counsel proceeded to prove the rules of the society by parol, having previously given notice to the defendants' counsel to produce all books and papers of the society, and having proved the same to have been in the hands of Baker, one of the defendants, who was secretary of the society. The first witness, Benjamin, proved the rules as contained in their constitution printed in 1805, and afterwards re-enacted. He also testified to some additional by-laws or amendments. He could not say that the printed constitution now produced was a copy of the former, and the defendant's counsel at first objected to its being given in evidence as such; but in the course of the examination thought proper to admit it.

It was farther proved, and not denied by the defendants, that on several occasions measures had been taken to give effect to their constitution, or rules, by giving notices to masters having journeymen or apprentices in their employ not members of the body; viz. for having more than two apprentices, or employing apprentices other than those of the members of the society; also, for employing journeymen who had infringed their rules. The notice in such cases was, that if they persisted to employ such persons, &c. or to disregard the rules of the body, their shop should be deserted by all the workmen of the society. This had been in some instances effect-

N<sup>W</sup> YORK,  
July 1810.

The People  
v.  
Melvin and  
others.

ed by means of what they called a *strike against the shop*, and the offending member was then termed a *scab*, and wherever he was employed no others of the society were allowed to work. There was a strike against the shop of Corwin & Aimes, but as it appeared to the society that they contrived to defeat its operation by privately getting their work done at other shops, the society, in November, 1809, ordered a general strike against the masters. There were one hundred and eighty-six members, and about as many journeymen who were not members, but all the best workmen were of the society. Benjamin, who testified as to this general strike, said he never knew of but one general turn out. He testified, that he had been fined and threatened for working against the rules of the society. He admitted, on his cross examination, that he came voluntarily into the society, and also, that on the question for a general turn out, the members voted by secret ballot, and that no compulsion is used, but every man votes according to his inclination, the majority carries it, and then it becomes a law, and the contraveners of it are scabbed. Edward Whittess had worked for Corwin & Aimes, about four or five years, and had joined the society about six or seven years ago. He was fined at different times, and at the time of the general meeting there was a *rumpus* in the society, which, with the multiplicity of the fines, determined him to leave it, and change his occupation, and take to cramping boot legs. He had, while a member, acted as sexton to a church, for which he had sixty dollars yearly. This prevented his attendance, and occasioned him sometimes to be fined. During the time he was first scabbed, his employer was obliged to discharge him until he paid his fine and was reinstated. He admitted that he came

voluntarily into the society, and remained in it six or seven years.

Mr. Aimes proved that he had received several notices, one to discharge Whittess, which he complied with; another to discharge a boy, an apprentice of Britton, who had worked with him two or three years. Witness thought it a great hardship that the old man should lose the profit of the work of the apprentice he had instructed, and did not discharge him, for which the body struck against him. On cross-examination, he admitted he had contributed some money towards carrying on this prosecution.

James Britton confirmed this testimony, and said, that after he had instructed his apprentice, whose work was his chief support, (he himself being in years,) he was deprived of that help by the influence of the body of which he was not a member.

Thomas Lewis was also examined; his evidence was not very material, being only confirmatory of the above particulars.

The defendants offered to show, as well from the witnesses on the part of the prosecution, as from other witnesses whom they should call,

1st. That long ago, prior to the strike or turn out, there was a combination of the masters for the express purpose of lowering the wages of the working men, and which was oppressive to them; and that their society originated in the necessity of protecting themselves against such combinations; and further, that the masters were now in combination for the purpose of this prosecution.\*

This was objected to and overruled, upon the ground that the misconduct of the masters would be no justification.

N<sup>W</sup> YORK,  
July, 1810.

The People  
v.  
Melvin  
and others.

\*It has been repeatedly decided in this court, that one conspiracy cannot justify another. In the case of the People v. Trequiere et al. vol. i. p. 146. which was a case of conspiracy of the journeymen hatters, Mr. Price, their counsel, offered to prove a conspiracy among the master hatters, and that the association of the journeymen was merely to counteract the combination among the masters. The court refused to hear the evidence, and the defendants were convicted.

N<sup>W</sup> YORK,  
July, 1810.

The People  
v.  
Melvin  
and others.

tion of the defendants. It was then offered as evidence in mitigation, but the court said, that if there were circumstances merely in mitigation of the sentence, they would come more properly in affidavit in case of conviction.

2d. The defendants attempted to show, that the wages and rates contended for, and demanded by, the journeymen, were reasonable, and no higher than to afford them a bare maintenance.

This evidence was not received, because none had appeared on the part of the prosecution, to show, that unreasonable or extravagant demands had been made. It was therefore held irrelevant to rebut what had not been proved.

3d. The defendants proposed to prove, that the masters made an excessive profit on the labour of the workmen; but this was refused also, upon the former ground, that the misconduct of the masters would not justify a conspiracy or illegal combination in the journeymen.

The court having, in the morning, intimated, that it would sit till twelve o'clock, rather than adjourn, defendants' counsel were called upon to sum up, and Mr. Sampson, pursuant to arrangement with Mr. Colden, commenced.

Mr.S. observed, that the difficulties under which he laboured, were beyond his force, and he was conscious that entering upon an argument of such a nature, under such disadvantages, was a forlorn endeavour. The evidence given did not in any shape alter the principles upon which he had argued six months ago, for the quashing of the indictment. That argument [alluding to his argument upon a prior hearing of this case] was addressed to a court of law, and founded upon the law, supposing all the facts charged in the in-

dictment to be proved. Nothing, certainly, had come out in evidence to prejudice the defendants, for there was not a single instance of violence or disorderly conduct, and it was conceded, that the demands of the workmen were not unreasonable or extraordinary. The single question would be, as it was considered by him, whether the law of England was to govern this case. He was aware how far the doctrines of the English law upon this head had unfortunately given a bias to the judgment of many individuals; and no doubt, some of those whom chance had arrayed to sit in judgment on this cause, must be presumed, however honourable and intelligent, to have imbibed more or less of that opinion. The jury, it is true, are judges of law and fact in criminal cases, and the arguments necessary to disentangle the question from such preconceived notions, must be of a nature too prolix and arduous to be offered, with a fair prospect of success, to a jury already exhausted and fatigued by a painful sitting, at a season when the powers of mind and body languish. Mr. S. farther observed, that in the former argument, he had found it necessary to turn over many volumes in order to show grounds for his opinions, and to cite numerous cases which it would be impossible now, at candle light, with sight so fatigued, and faculties so exhausted, and in a state of health so ill suited to exertion, to resort to. The very circumstance of his having undertaken to report the former arguments, with all the tiresome labour of transcribing, compiling and correcting of the press, had effaced the livelier impressions of first conceptions, and must impart to what he should offer the vapid insipidity of a tale twice told. The many books already referred to, and now produced by the opposite counsel, seemed to forewarn him that they meant to renew the learned efforts of the former contest, and many of them referred to by Mr. Griffin were not noticed till the moment it was necessary for him to reply to them, when it was impossible for him to answer

NEW YORK,  
July, 1810.

The People  
v.  
Melvin and  
others.

N<sup>W</sup> YORK,  
July, 1810.

—  
The People  
v.

Melvin and  
others.

but from vague recollection or repetition of his former argument, or reference to the printed report. [Mr. S. in referring to his former argument, read the authorities from the printed report, but omitted much the greater part, from unwillingness to fatigue the attention of the jury already exhausted. After he had concluded, it was thought too late to hear the other counsel, and the court adjourned till the following day at ten o'clock.]

Mr. *Colden* followed Mr. *Sampson*, and re-examined the principles of the law, and the leading authorities; reasoning upon them, and applying them to the case with great discrimination and ability. Admitting all the cases cited against the defendants from the English books to be of full authority, that none of them would warrant a conviction. It seemed to him, that the moment it was admitted that the object of the conspiracy was not criminal, there ought to be an end of the prosecution. And the doctrine and argument touching a conspiracy, to do a lawful act by unlawful means, seemed to him a distinction without a difference, an unnecessary refinement, and at best a begging of the question. To conspire to use unlawful means, was to conspire to do an unlawful thing, and was an unlawful conspiracy. All that he admitted freely. But when that was admitted, the question, whether there had been such a conspiracy, was not a whit advanced, and he contended as confidently as before, that there had not. He read and commented upon the constitution of the society, and maintained that all the words of coercion with which it abounded, all the terms of arbitrary command, which might furnish such fertile subjects for declamation, were innocent and harmless, and would be so considered by candid judgment, when the undeniable truth was taken into the account, that the only compulsion they used was a refusal to work with those whom they considered as joining in oppression against them. There was a well-received and settled definition of crimes, by which they

were divided into two comprehensive classes, those called *mala in se*, which were crimes against the universal laws of God and nature, and those termed *mala prohibita*, or offences against positive institutions. There must in this country be statutes enacted by the legislature, which speak the will and voice of the people. Beyond this definition there can be no crime, and it is impossible to draw the refusal of a body of men to labour under terms disadvantageous to themselves, or which they think disadvantageous to them, under either branch of this definition, without more subtlety than ought to be admitted in the law; and more straining than the genius of our code allows, to be used against defendants in any criminal case.

N<sup>W</sup> YORK,  
July, 1810.  
The People  
v.  
Melvin  
and others.

Mr. Griffin first summed up on the part of the prosecution. The law having been already so fully discussed, and the necessary limits of this report rendering it necessary to compress the account of the trial, on which the facts were few, and of no great interest or novelty, nothing more can be given than the outlines of the summing up.

To the authorities cited by the counsel for the prosecution on the former argument, Mr. Griffin added the following: *Rex v. Rispal*, 3 Burr. 1320, the remarks of Lord Mansfield and Justice Yates, on the subject of conspiracies, in *Virtue v. Lord Clive*, 4 Burr. 2475, 6, the observations of Justice Grose on the same subject, in *Rex v. Mawbey et al.* 6 D. & E. 636, and the cases of *Rex v. Hammond et al.* 2 Esp. Rep. 719. *Rex v. Locker et al.* 5 Esp. Rep. 107. *Rex v. Salter et al.* 5 Esp. Rep. 125.

Mr. Griffin applied himself very forcibly in answer to the observations of Mr. Sampson, upon the common law; and instead of judging it by the sharp rules of criticism, desired that it might be fairly and candidly judged by its effects. He drew a comparative view of the condition of the English people, and the English peasantry, with that of the people of the continent of Europe; of the independence

NEW YORK,  
July, 1810.

~~~~~  
The People
v.
Melvin
and others.

of the one, and the debased and servile condition of the other. Admitting that the national code was the source of national improvement, manners, and civilization as was argued by Mr. Sampson, what better eulogim could be passed upon the common law of England than the flourishing and happy situation of the nation where that code prevailed; if the people of England, with all their grievances, are so much above the servile state of boors, or the debased and benighted condition of those of Spain and Portugal, and other countries where the sword and the inquisition govern without control of law, it must be, even from the argument of his opponent, that the national code is more exalted and more beneficial.

Why is it, added he, that "slaves cannot breathe in England?" Why is it, that "they touch that country and their shackles fall?" It is the common law which strikes off their fetters, it is the common law which expands them into freemen.

If England, in the times of general disorder throughout Europe, escaped almost singly from the devastations of civil war, revolution and invasion, it was owing to the love of the laws that animated the people to contend, heart and hand, for their precious birthright, and to the genius of their constitution that watched over their destiny. What else had protected the English people from guillotine, bas-tile and inquisition? What else had implanted in the United States the principles of freedom which had grown up and matured, and finished in their perfect independence? Why was their condition even as colonies, so much above that of Brazil or Mexico, countries towards which nature had been perhaps more lavish of her favours? It was the principles of the common law which our ancestors brought with them, which first prompted them to assert their independence, and then in the days of trial and of strife, moderated the fury of revolution, and served as sure and solid foundations of future security. It


was in that free and hallowed volume which served as their palladium, and in which they found written the first lessons of their independence. It was the mild spirit of the common law that tempered the evils of civil convulsion and calmed the agitated waves, and finally shone forth with renovated lustre when those storms had passed away; that common law, the great magazine which supplied our state and national constitutions with abundant and useful materials for their solid structure.

Mr. Griffin then argued upon the evidence, and admitted that there had been no personal violence, no outrage or disorder, but asked if the coercive measures of the society were less cruel or oppressive for that reason. He made strong remarks upon the imperious and tyrannical edicts of the constitution and by-laws of the society, and asked whether it was possible for any workman to enjoy, without molestation, the indisputable rights of peace, neutrality, and self-government, in his own private and particular concerns. A journeyman was neither free to refuse entering into the society, nor at liberty, having done so, to leave it without incurring ruin or unmerited disgrace; and to the real impoverishment which he must undergo, and to the evils heaped upon all who befriend him—to all this was added, the opprobrious epithet of *scab*. If an individual master refused obedience to their laws, or fell under the displeasure of the society, a stroke was directed against him. And, though the stroke was not a corporal wound, it was a cruel and ruinous infliction, from which he could have no relief, unless the law provides one. He was proscribed without remorse, and outlawed without mercy.

If the master workmen in general happened to offend this society, a general cessation of labour amongst the members of their own body was decreed, to which obedience was rigorously enforced; however much the necessities of their families might require their work, idleness was enjoined upon them. They were commanded to do no man-

NEW YORK,
July, 1810.
The People
v.
Melvin
and others.

NEW YORK,
July, 1810.


The People
v.
Melvin
and others.

ner of work; but it was a Sabbath not of rest, but of vengeance, of desolation, and of suffering. Mr. Griffin urged then a variety of other topics with great strength and effect, and concluded by what might be understood as a summary of his argument. He did not complain of the defendants for forming themselves into a society, but for compelling others to become members. He did not accuse them of having advanced the price of their own labour, but of conspiring to regulate, by measures of rigour and coercion, the wages and the will of others; his charge against them was not that they chose and determined for what employers they would or would not work, but that they had exercised an aristocratic and tyrannical control over third persons, to whom they left neither free will nor choice; and that they employed, to effect this purpose, means of interference in their concerns to which it was impossible for the sufferers to oppose any resistance.

Mr. *Emmet* closed the prosecution. Before he began, Mr. Sampson cited a passage from Reeve's History of the Common Law, to show that besides the ordinances to which he had adverted, all to be found in Keble's Statutes, there was a special jurisdiction and particular laws touching the staple of wool, and that the charge of conspiracy against the merchants in the reign of Edward III. might have very possibly been for an infringement of that code, which was called the law of the staple. So that there were two ways of accounting for it, viz. by the general statutes, or by these particular regulations, in neither of which it could be an argument that such conspiracies were by the common law. Mr. S. said he would go no higher into antiquity. If his learned friend chose to do so, he might now mount up Jacob's ladder, of which one end was in this world and the other in the world above. Mr. S. also cited a certified opinion of Judge Scott of Maryland, in MS. where two cases

were adjudged, one, where after conviction a new trial was refused, and another, when on demurrer to evidence judgment was for the defendant; on this distinction, that where the party said to be injured went voluntarily into the society, there was no injury done him, however it might be if he was compelled. This, he said, was applicable to the cases of Benjamin and Whittess, both of whom had entered voluntarily.

N^W YORK,
July, 1810.

The People
v.
Melvin and
others.

Mr. Emmet declared that it was not his intention to advert on this occasion to a single-law case, nor to open one of the numerous authorities that lay upon the table, because he had observed with what pain the jury had endeavoured to listen to the elaborate arguments of his learned adversaries, whenever they turned upon abstruse deduction from the antiquities of the law. He neither blamed the counsel nor the jury in this respect; both had tried to do their duty, and he could not withhold his admiration of the research and ingenuity of his friend, who had shown such force of learning and industry. But it was plain that it was but labour in vain; for it never could be expected from the most intelligent jurors that ever were empannelled, that they should, in the incidental discharge of a duty for which they had no previous course of preparation, following the ablest and clearest logician through a range of argument which it must have cost a practised and educated lawyer so much time and trouble to compose. It was what never was required of any jury; and it was not within their province, nor were they the worse jurors for not being deep read lawyers. The constitution had appointed two distinct offices: Judges had to determine questions of law, and jurors to decide upon questions of fact; and although the jury in criminal cases had the undoubted power when they chose to exert it, of deciding upon law and fact, yet that was a right or power which a discreet jury would never assert but in

N^W YORK,
July, 1810.

The People
v.
Melvin and
others.

cases where the strongest exigencies required them to do so. There were indeed occasions, when important public principles were in jeopardy, when it might be used as a saving and salutary privilege; but nothing less than such occasions would warrant a jury to pronounce upon what no understanding, by the simple force of common sense, could be equal to. The certainty of the criminal law is as important as that of the civil, and that can only be preserved by leaving it to be expounded by judges, to whom education and habit have rendered it familiar, and who join knowledge of its theory to the aptitude which practice gives. Discreet jurors know that no science is intuitive, and that law, which comprehends the rules of all men's actions, can never from its nature be so simple as that some difficulties must not at times arise in the exposition of it. When they do, it is impossible to lay down the rule, but from a knowledge of what has been established by usage or by statute, and to do so safely, a knowledge of causes and consequences, which practice only gives, is essential. As well might a lawyer think himself qualified without any previous education, to be a merchant, a farmer, or an artist, as any of those to be a lawyer. And this plainly appeared to me in the course of the summing up on the other side. Where it turned upon the facts in evidence, I saw the jury giving an attentive ear; where it was general reasoning, I could mark them listening with patience; where it was humour and fancy, I saw the pleasure they received, and I joined in it, for wit and vivacity will always captivate and please; but when that laboured chain of induction which did credit to the industry and reasoning powers of my learned friend, was offered to the jury-box, I could discern in their individual countenances the truth of that sentence which says, "to questions of law jurors are not to answer."

One observation, however, touching the strictures pass-

ed upon the absurd antiquities of the common law ; and I am far from denying the barbarity of its origin, and that it originated in dark and ignorant times. It is this ; that its course has been marked with progressive improvement, which alone is elugium and security enough. Mr. Emmet then passed to the constitution of the society, and dwelt with his usual force upon several of its provisions, which he represented as arbitrary and tyrannical, and going to erect an *imperium in imperio*, and overbear the rights of the citizen and the law of the land.

He took advantage of the hardship of *Briton's* case, and drew a lively and pathetic picture of the sufferings of an inoffensive old man, and of the cruelty of exacting from his employer the hard sacrifice of his abandonment, at the peril of his own destruction. He said he was not the advocate of any oppression, and if the masters had combined for any purpose of oppression, or in any shape against law, he would wish as much as any man that they should be indicted and convicted.

His address was such as the reporter would willingly lay before the public, did the limits prescribed to him admit of it ; but the same reasons for which the speeches of the other counsel have been abridged, must serve as his apology.

The charge of the court was then delivered by his honour the *Mayor*, to the following effect.

He observed there were two points of view in which the offence of a conspiracy might be considered ; the one where there existed a combination to do an act, unlawful in itself, to the prejudice of other persons ; the other where the act done, or the object of it, was not unlawful, but *unlawful means** were used to accomplish it. As to the first, there could be no doubt that a combination to do an unlawful act was a conspiracy. The sec-

N^W YORK,
July, 1810.

The People
v.
Melvin and
others.

* The gist of a conspiracy is the unlawful confederacy to do an unlawful act, or even a lawful act for an unlawful purpose. The offence is complete when the confederacy is made ; and any act done in pursuance of it, is no constituent part of the offence. 3 Mass. Rep. p. 329. Ante, v. 1, p. 223.

NEW YORK,
July, 1810.

The People
v.
Melvin and
others.

and depended on the common principle that the goodness of the end would not justify *improper means* to obtain it. If, therefore, in the present case, the defendants had confederated either to do an unlawful act, to the injury of others, or to make use of *unlawful means* to obtain their ends, they would be liable to the charge of a conspiracy. He observed, that the court did not mean to say, nor did the facts in the case require them to decide, whether an agreement not to work,* except for certain wages, would amount to this offence, without any unlawful means taken to enforce it.

* Journey-men confederating and refusing to work, unless for certain wages, may be indicted for a conspiracy, for this offence consists in the *conspiring*, and not in the *refusal*, and conspiracies are illegal, although the subject matter of them be lawful. 6 Mod 11, 320. A bare conspiracy to do a lawful act to an unlawful end is a crime though no act be done in consequence thereof. 8 Mod. 321. See the cases collected, vol. i. p. 150, 151.

Much has been said as to the application of the common law of England to the case. The absurdities of the ancient common law, and also of the statute law of England, had been exhibited in the strongest light. It was well known, that many of the ancient rules of the common law on this and other subjects had been exploded or become obsolete, and that little of the mass of absurdities complained of by the defendants' counsel, remained in force even in England. In this state the court could not be at a loss in deciding how far the common law of England was applicable. Our immediate ancestors claimed it as their birthright. They considered it as securing to them many of their highest privileges, and they often appealed to that law in support of their rights, and against the arbitrary extension of power by the British parliament. The constitution of this state had also expressly adopted it, and declared, that such parts of the common law of England, and the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of said colony on the 19th April, 1775, and not repugnant to the constitution, should be and continue the law of this state, subject to such alterations and provisions as the

legislature of this state shall from time to time make concerning the same, &c. No alteration having been made by our constitution or laws, the common law of England, as it existed at the period last mentioned, must be deemed to be applicable, and by that law the principles already stated appeared to be well established. No precedents, it was true, of convictions or judgments upon them had been produced from our own courts, but no strong inference could be drawn from that, as until lately such precedents had not been preserved, and no printed reports of adjudged cases had been published.

The injury produced by unlawful combinations might affect any person or number of persons, as in the present case the master workmen, or the fellow journeymen of the defendants, or any other individuals. It appeared in evidence, that the society of journeymen, of which the defendants were members, had established a constitution, or certain rules for its government, to which the defendants had assented, and which they had endeavoured to enforce. These rules were made to operate on all the members of the society, on others of their trade who were not members, and through them on the master workmen, and all were coerced to submit, or else the members of the society, which comprehend the best workmen in the city, were to stop the work of their employers. One of the regulations even required that every person of their trade, whom they thought worthy of notice, should become a member of the society, and of course become subject to its rules, and in case of neglect or refusal, it imposed fines on the person guilty of disobedience. When the society determined on any measure, it found no difficulty in carrying it into execution. If its ordinary functions failed, it enforced obe-

N^W YORK,
July, 1810.

The People
v.
Melvin and
others.

N^W YORK,
July, 1810.

The People
v.
Melvin and
others.

dience by decreeing what was called a *strike* against a particular shop that had transgressed, or a general turn out against all the shops in the city, terms which had been explained by the witnesses, and were sufficiently understood. These steps were generally decisive, and compelled submission in all concerned.

Whatever might be the motives of the defendants, or their object, the means thus employed were arbitrary and unlawful, and their having been directed against several individuals in the present case, it was brought, in the opinion of the court, within one of the descriptions of the offence which has been given.

The jury retired, and shortly after returned a verdict against the defendants.

The sentence was then passed by his honour the Mayor, who observed to the defendants, that the novelty of the case, and the general conduct of their body composed of members useful in the community, inclined the court to believe that they had erred from a mistake of the law, and from supposing that they had rights upon which to found their proceedings. That they had equal rights with all other members of the community was undoubted, and they had also the right to meet and regulate their concerns, and to ask for wages, and to work or refuse; but that the means they used were of a nature too arbitrary and coercive, and which went to deprive their fellow citizens of rights as precious as any they contended for. That the present object of the court was rather to admonish than to punish; but an adjudication upon the subject being now solemnly had, it was recommended to them so to alter and modify their rules and their conduct, as not to incur in future the penalties of the law.—They were fined each one dollar, with the costs.

CIRCUIT COURT UNITED STATES.

BALTIMORE, MAY, 1818.

United States. }
vs. } ROBBERY OF THE
Joseph Thompson Hare. } MAIL, &c.

Present—Hon. *Gabriel Duval*, }
Hon. *James Houston*, } Judges.

William Wirt, Attorney General of the United States;
Elias Glenn, District Attorney, *Thomas Kell*, and *Reverdy Johnson*, Esqrs. Counsel for the Prosecution.

Gen. *William Winder*, *David Hoffman*, *Charles Mutchell*, *Upton S. Heath*, and *Eben. L. Finley*, Esqrs. Counsel for the Prisoner.

In the Circuit Court of the United States of America, for the fourth circuit, held at the city of Baltimore, in and for the Maryland district.

Maryland District, to wit.—The grand inquest of the United States of America, for the fourth circuit, inquiring for the body of the Maryland district, upon their oaths, do present, that Joseph Thompson Hare, late of the said district, yeoman, together with a certain Lewis Hare, and a certain John Alexander, on the eleventh day of March, in the year eighteen hundred and eighteen, in the night of the same day, in the public highway at Harford county, at the district aforesaid, in and upon one David Boyer, then and there being the carrier of the mail of the said United States, and the person entrusted therewith, and in the peace of God and of the said United States, then and there being, with force and arms, at the district aforesaid, feloniously did make an assault, and him, the said David Boyer, in bodily fear and danger of his life in the highway aforesaid then and there did put, and with the use of certain dangerous weapons, to wit, pistols and dirks, which the said Joseph

Robbing the carrier of the mail of the U. States, or other person entrusted therewith, of such mail, by stopping him on the highway, demanding the surrender of the mail, and at the same time showing weapons calculated to take his life, such as pistols or dirks, putting him in fear of his life, and

obtaining possession of the mail by the means aforesaid, against the will of the carrier, is such a robbing of the mail, and such a putting the life of the carrier or person entrusted therewith in jeopardy, by the use of dangerous weapons, as will bring the offence within the following terms of the 19th section of the act of congress of the 30th April, 1810, entitled "An act regulating the post office establishment," to wit; "or if in effecting such robbery of the mail, the first time, the offender shall wound the person having the custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender or offenders shall suffer death."

BALTI-
MORE
May, 1818.

United States
v.
Hare.

Standing mute
on a charge of
felony against
the laws of
the United
States, is equi-
valent to a
plea of not
guilty.

Thompson Hare, then and there in his hands held, he, the said Joseph, did put in jeopardy the life of said David Boyer, he, the said David Boyer, then and there being entrusted with, and having the custody of the said mail of the said United States, and the mail aforesaid, so entrusted and in the custody as aforesaid of said Boyer, certain bank bills, letters, and packets to the jurors aforesaid unknown, belonging to certain persons to the jurors aforesaid unknown, from the personal custody and care of the said David Boyer, and against his will, in the highway aforesaid, at the district aforesaid, then and there feloniously and violently did rob, steal, take, and carry away, against the form of the statute of the said United States in such cases made and provided, and against the peace, government, and dignity of the said United States of America.

And the jurors aforesaid, upon their oaths aforesaid, do farther present, that the said Joseph Thompson Hare, together with the said John Alexander, and Lewis Hare, on the eleventh day of March, in the year aforesaid, in the night of the same day, in the public highway at Harford county, at the district aforesaid, in and upon David Boyer, he then and there being the carrier of the mail of the said United States, and the person entrusted therewith, and in the peace of God, and of the said United States, then and there being, with force and arms, at the district aforesaid, feloniously did make an assault, and him, the said David Boyer, in bodily fear and danger of his life, in the said public highway, then and there, and with the use of certain dangerous weapons to wit, pistols and dirks, which the said Joseph Thompson Hare then and there held in his hands, the said Joseph Thompson Hare did put in jeopardy the life of said David Boyer, then and there being entrusted with, and having the custody of said mail, and the said mail of the said United States from the custody, possession, and care of said David Boyer, and against the will of said David Boyer, in the highway aforesaid, at the district aforesaid, did then and there feloniously and violently rob, steal, take, and carry away, against the form of the statute of the said United States of America in such cases made and provided, and against the peace, government, and dignity of the said United States of America.

And the jurors aforesaid, upon their oaths aforesaid, do farther present, that the said Joseph Thompson Hare, together with the said John Alexander, and Lewis Hare, on the eleventh day of March, in the year aforesaid, in the night of the same day, at Harford county, in the district aforesaid, in the public highway, in and upon David Boyer, then and there in the peace of God and the said United States, being, and then and there being the carrier of the mail of the said United States, and the person entrusted therewith, at the district aforesaid, feloniously did make an assault, and him, the said David Boyer, then and there having the custody of the said mail of the said United States, in bodily fear and danger of his life then and there feloniously did put, and from the custody and possession of said David Boyer, and against the will of said David Boyer, in the highway aforesaid, at the district aforesaid, feloniously and violently did rob, steal, take, and carry away the said mail of the said United States, then and there containing sundry letters, bank bills, and packets, to the jurors aforesaid unknown, belonging

to certain persons to the jurors aforesaid unknown, contrary to the form of the statute of the said United States in such cases made and provided, and against the peace, government, and dignity of the said United States of America.

ELIAS GLENN.

District Attorney of the United States for Maryland District.

True Bill.

JOHN STRICKER, Foreman.

The grand jury having returned bills of indictment against the prisoner, John Alexander, and Lewis Hare, they were brought before the court for arraignment. Upon the arraignment of Joseph Thompson Hare, he pleaded not guilty. The indictment against Lewis Hare was then read to him, when Mr. *Mitchell*, on the part of the prisoner, observed, that the counsel were not prepared to plead, nor to advise what plea was proper to be entered. The court decided, that as the prisoner had been arraigned, he must plead *instantly*; and observed, that his plea should not be considered with any prejudice to his rights, and might be withdrawn the next day, if the counsel thought proper. A plea to the jurisdiction, and a plea of not guilty were then tendered. John Alexander was then arraigned, and the same plea tendered.

Tuesday, May 5th—The prisoners were brought before the court. Their counsel asked leave to withdraw their pleas, stating they had not considered what course would be most beneficial for the accused. Mr. *Kell*, on the part of government, objected, unless the counsel for the prisoners would state what was their object in withdrawing the pleas. The counsel replied, that they had entered them upon an unconditional promise of the court, that the pleas might be withdrawn if the counsel for the prisoner thought proper. To this Judge Houston assented; and by order of the court, the pleas were in each case withdrawn. The prisoners were then severally placed in the bar, and were informed by the court, that they had allowed their pleas to be withdrawn, and that they were now to plead anew. The indictments were then read in each case, and the prisoners were severally arraigned, and upon being asked whether they were guilty or not guilty, they stood mute and refused to answer. The counsel for the prisoners informed the court that they had instructed them to stand mute. The district attorney then stated, that the court might proceed in the same manner as if they had pleaded not guilty, either under the 30th section of the act of congress of 1790, entitled, "An act for the punishment of certain crimes against the United States," or that the court might proceed against them as at common law. The court, however, took time till the next day, to make up their opinion on the proper course of proceeding.

Wednesday May 6th.—The court met, and the counsel for the prosecution and the counsel for the prisoner appearing, the court heard an argument on the proper course of proceeding in the trials of the prisoners.

Reverdy Johnson, Esq. on the part of the prosecution, addressed the court to the following effect:—The court are now called on to decide a question, which I believe has never before presented itself to any of the courts of the United States. That is, whether this court has the power to proceed to the trial of the persons in-

BALTI-
MORE.
May, 1818.

United States

v.
Hare.

BALTI-
MORE,
May, 1818.

United States
v.
Hare.

dicted of robbing the mail of the United States, notwithstanding their refusing to plead, or, in technical language, their standing mute? As one of the counsel for the prosecution, it becomes my duty to show the court they have such power.

If this offence was especially contained in the act of congress of 1790, chap. 9., then there could be no doubt as to the course which the court on this occasion ought to adopt; because it would be expressly provided for by the 30th section of that law. It will, however, no doubt, be contended by the counsel for the accused, that inasmuch as the offence for which their clients are indicted, was not created by the act of congress of 1790, but by that of 1810, for the regulation of the post office; that, therefore, the provisions of the 30th section of the former law, for incidents like the present, in the trial of offences, only embraces offences created by that law, and does not extend to those of a subsequent origin, or in other words, that that provision cannot be construed to apply to offences which did not exist at the time such provision was made. I will, however, endeavour to convince the court, that by a fair and liberal construction of the act of congress of 1790, the case before the court is included in the provision in question; by the 29th section of that law, after directing that every person accused of treason, shall have a copy of his indictment, and a list of the jury, &c. three days before he shall be tried for the same; and it is further directed, "*that in other capital offences*, he shall have such copy of the indictment, &c. two days before his trial." That section farther provides, for persons so accused, many other rights and privileges. Then comes the 30th section, and so far as is necessary for the consideration of the question before the court; it is in these words, "If any person be indicted of treason against the United States, and shall stand mute, &c. or if any person be indicted of *any other of the offences herein before set forth*, for which the punishment is declared to be death, if he shall stand mute, &c. the court in any of the cases aforesaid, shall, notwithstanding, proceed to the trial of such person so standing mute, &c. as if he or they had pleaded not guilty, and render judgment thereon accordingly."

The court will perceive, that the offences in both these sections of the law are enumerated in the same order, and that the only variance in their language is, that the words "*other capital offences*," are used in the second sentence of the 29th section, and the words "*offences herein before set forth*," in that of the 30th section. From this similarity, therefore, it would seem to follow, that the provisions of both sections should receive the same construction; and since no one can doubt but that the persons now indicted are entitled to copies of the indictments, and to all the other privileges given by the 29th section, so also, it seems to me impossible that any one can conceive that the power of the court to proceed to trial, when the party stands mute, as provided by the 30th section, does not also extend to the case now before the court. Again; the words "*herein before set forth*," contained in the 30th section, which the counsel on the other side will contend prevents the provisions of that section from applying to the case before the court, can, as I apprehend, receive no other sensible construction than that which will extend it, not only to offences specially described

in the preceding part of the law, but to every offence previously mentioned; and since the general words, "other capital offences," in the immediate preceding section of the law, it is admitted on all hands embraces every offence against the laws of the United States, and, therefore, the offence now to be tried; it follows, that the provisions of the 30th section extend also to this case. As another reason for giving liberal construction to the words "herein before set forth," I would remark to the court, that the provisions of the 30th section did not infringe any right, which persons in such situations previously enjoyed, but on the contrary, gave them an additional privilege. To show the court that I am correct in this opinion, I refer them to the 11th section of the act of congress of 1789, c. 20., by which exclusive jurisdiction of all crimes and offences, cognizable under the authority of the United States, is given to the circuit courts of the United States, except where it is otherwise directed; and to the 34th section of the same law, where it is provided, that the laws of the several states, except when otherwise directed, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. If then the provisions of the 30th section of the act of congress of 1790, should be construed by reason of the words "herein before set forth," to extend only to the offences created by that act, it follows, that in the trial of all other offences, where the persons accused stood mute, the court would be obliged to proceed as the laws of the state, in which the trial happened, in like cases directed. What then previous to the act of assembly of Maryland, of 1809, c. 138, by which, in all cases of treason or felony, where the party stands mute, a similar provision is made to that of the 30th section of the act of congress of 1790, was the law in such cases in this state? I state it to have been, and I do so without fear of contradiction, that a standing mute amounted to a confession of the charge, and that judgment would have been rendered thereon, as on the finding of the verdict. In order to satisfy the court that such was the law, I refer them to Kilty's Report of English statutes, p. 17., wherein a note on the statute of Westminster, 3 Edward I. c. 12., two cases are cited in which such judgment was awarded, and to the statute of 12th Geo. III. c. 20. which directed such judgment in all cases of felony, to be entered, which statute extended to this state by express provision, as the court will find by the same report of statutes, p. 199. I think that I have now satisfactorily shown the court, that I was right in saying, that the 30th section of the act of congress of 1790, did not restrain, but enlarged the privileges of persons accused of offences against the laws of the United States. If, however, the court should be of opinion that I am wrong in giving this liberal construction to the act of 1790, and that the provision of the 30th section of that law cannot be made to apply to the case before the court. I think there is another ground, on which the court may safely proceed to the trial of these persons, and it is shortly this. By the 34th section of the act of congress of 1789, c. 20. which I have before had occasion to refer to, it is directed, "that the laws of the several states, except where the constitution creates, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at

BALTI-
MORE,
May, 1818.

United States
v.
Hare.

BALTI-
MORE,
May, 1818.

United States
v.
Hare.

common law in the courts of the United States, in cases where they apply." I imagine it will hardly be contended, that this provision was intended to be confined to such laws of the states as were in existence at the time that act of congress was passed. There is nothing in the language of the provision which justifies such a restricted construction. The words are general, that the laws of the several states, &c. shall be rules of decision in the courts of the United States, except where it is otherwise directed. What then is the law in this state, on a case like the present? By the act of assembly of 1809, c. 138. section 12. which I have also before incidentally noticed, it is provided "that if any person be indicted of treason or felony, and he or she shall stand mute, or will not answer to the indictment, the court in such case shall notwithstanding proceed to the trial of such person so standing mute, as if he or she had pleaded not guilty, and render judgment thereon accordingly." If therefore, the court should be of opinion, which I am far from anticipating, that they have no authority to go on with the trial of those persons, under the 30th section of the act of congress of 1790, I imagine they then cannot doubt, but that they have such power under the act of assembly of this state, when taken in connection with the 34th section of the act of congress of 1789. Because, if "there be nothing in the constitution, treaties, or statutes of the United States, which otherwise provides," that act of assembly must be regarded as a rule of decision by the courts of the United States, and this court is bound by it under the 84th section of the act of congress of 1789; and as no such provision can be found, this court has full and complete authority, nay, they are compelled to proceed according to that act of assembly, and that is, to go on to try those persons as if they had pleaded not guilty. Here I think I might safely rest this question. There are, however, some other remarks which, with the permission of the court, I will now suggest. If the acts of congress of 1789 and 1790 had never passed, I feel but little hesitation in saying, that you would notwithstanding have no difficulty in proceeding with this trial; because, as the trial by jury for offences of this kind is directed in general words, by the constitution of the United States, it would follow, that all the incidents to that mode of trial, in the absence of particular provisions on the subject, would be considered as also directed. In the whole history, then, of jury trial, previous to the time of Edward I. I defy the counsel for the accused, to point out a single instance where a person escaped a trial by standing mute. If this mode of trial was ever at any stage of its existence, so defective as to suffer such an escape, it is obvious, that they would always have been effected, and that the trial itself would have been only a mockery of justice. The gentlemen may possibly say, that the party might have escaped a trial by standing mute, he could not have escaped with impunity, as he would have been subject to the dreadful punishment of "*piene forte et dure*." I deny, however, that such a punishment ever existed at common law. We are to look for its origin to the statute of Westminster, 3 Edw. I. c. 12. By the common law, standing mute was, in all cases as it is now, by the statute of 12 George III. a confession of guilt. To prove this, I refer the court to 4 Black, Com.

337. In the United States, however, it is very certain that the punishment of "*piene forte et dure*," never existed.

In the absence then of all statutory provisions, the court would be justified in considering those persons as confessing their guilt, and in according judgment against them accordingly. There is, however, another reason, which to my mind, shows conclusively, that you must have the power to proceed with this trial, and it is, that if you have not that authority, those persons must escape unpunished, since the state courts, in cases like the present do not possess concurrent jurisdiction, because they have not the power of punishing to as great an extent as the act of congress prescribes for the punishment of those persons if they should be convicted. The courts of the states have only jurisdiction over the prosecution of such offences against the act of 1810, under which the persons now before the court are indicted, as by the laws of the state they can punish to as great an extent as that act directs. If then the counsel for the accused are right, robberies of the mail of the United States may be effected with almost perfect safety, since, if detected, the robbers may escape being tried, by adopting the plan of the persons now charged with that offence; or in other words, if they will only stand mute, when arraigned, they may securely bid defiance to the laws of the land, and render the act of 1810, so far as it regards the offences of robbing the mail, a dead letter. I believe I have now put the court in possession of all the observations that have occurred to me on this question. I feel confident that much more might be said than I have been able to suggest. I shall be followed however by gentlemen who will add every thing which the question admits of. I feel sorry that I should have suffered myself to have trespassed so long on the patience of the court. I return the court thanks for the kindness with which they have listened to me, and I conclude with a full assurance that this trial will go on as if the prisoners had pleaded not guilty.

Elias Glenn, Esq. District Attorney for the Prosecution.—The question now under consideration presents more of novelty than of difficulty. The learning respecting standing mute has been long considered rather as a subject for the curious student, than of essential importance to the practical lawyer. To-day, for the first time since the adoption of our present form of government, we have to inquire a little into its nature, and to ascertain, whether the voluntary act of a criminal can obstruct the progress of justice, and put at defiance laws the most salutary and necessary for society.

According to my understanding of the case, this is its situation—upon their arraignment in the first instance, the prisoners pleaded not guilty; their counsel, after some advisement, thought proper to request of the court that this plea might be withdrawn, in order, according, to my impression, that the prisoners might plead *de novo*, for if such an understanding had not existed with the court, would they for one moment have permitted any alteration to have been made in a plea which gave to the prisoners every fair and proper advantage that a prisoner ought to possess—if such impression were correct, and the court knew, as is the fact, that the visitation of

BALTIMORE,
May, 1818.

U. States
v.
Hare.

BALTI-
MORE,
May, 1818.

United States

v.
Hare.

God has not silenced the prisoners, would it not be proper for the court to insist on some plea being filed in the cause?

But waving, for argument's sake, this consideration—let us enquire in what predicament the court is now placed—whether the trial must stop at this place, and the infliction of the punishment provided by law for offences of the high character charged in this indictment is to be prevented by this course of proceeding.

I shall contend on this point—1st. That this conduct of the prisoners is a constructive confession, and the court must proceed to pass sentence upon them. Or 2d. That the court may proceed to the trial, as if the general issue plea of not guilty had been interposed.

1st. The counsel for the prisoners contend that this is a *casus omisus* in the law, and there being no common law by which the courts of the United States can be governed in criminal cases.—We must stop here. If the prosecution is to derive no benefit from the common law, the prisoners must be upon the same footing in this respect; they are to have no benefit of it either, and our common sense is called in to govern in the decision of this case—and what would that say? that the prisoners were guilty; that their silence is a constructive confession. In pleading (which is justly said to be a system of sound reasoning) not denying an allegation, is an admission of it. If a defendant in a civil suit say nothing, judgment is rendered against him.

If a charge be made against a man in his presence, and in his hearing, and he does not deny it, this might be given as evidence to prove the fact thus charged upon him. Now, if the very facts laid in this indictment had been charged upon the prisoners in any other place than a court of justice, and they had pursued the same line of conduct which they have now adopted, such conduct would have served as testimony to have produced a conviction for this very crime.

For whose benefit was the provision of the act of April 30th, 1790—for the benefit of the prosecution or of the prisoner? Unquestionably for the benefit of the prisoner: he is by his obstinacy, amenable in a degree to the court; but our laws (wishing to give a criminal every possible advantage of a *fair and impartial trial*) have considered him as guilty of no offence in the particular cases therein mentioned; then if the provisions of that act do not reach this case, the prisoners are not even entitled to the lenient and merciful provisions of that law.

On the second point Mr. Glenn contended, that as an incident to the power and authority of the court, they had a right to try these men. The prisoners have divers privileges for their own benefit; they may plead not guilty, they may have counsel, they may have witnesses, they may challenge jurors, they are entitled to a copy of indictments, and a list of the witnesses. But if they decline the enjoyment of their rights, is the progress of justice to be arrested? If they will not receive a copy of their indictments, are they never to be tried? If they will not enjoy the benefit of counsel, is the court obliged to wait until their better judgment shall induce them so to do? If they will not challenge jurors, must the court pause until they think fit to challenge them? These are all

privileges granted to the prisoners; they may accept or refuse them at their pleasure; but such refusal shall never operate to retard the march of justice in its course.

In England, a speedy disposition of these causes would have been made by the common law; this conduct of the prisoners is a constructive confession. Staundford's Pleas of the Crown, 149, 2 Hawkins' Pleas of the Crown, ch. 30 § 13. 2 Hale's History of the Common Law, 317. 322. 4 Bl. Com. 324. 329. Now if the court cannot proceed with these trials, the monstrous absurdity follows, that a criminal by a shift, a trick, may forever evade the provisions of a penal law—a proposition, the statement of which carries with it its own refutation.

This court must frequently proceed according to the directions of the common law; they can fine jurymen and witnesses for non-attendance, nay if a bystander had advised the prisoners at the bar to stand mute, would the court not have punished him for such conduct? In England they certainly would. 4 Bl. Com. 125. It would be arresting the progress of justice, and I think the court would be fully authorized to impose a penalty similar to that inflicted in England.

But we consider this case as coming reasonably within the provisions of the act of 30th April, 1798, or to be governed by the rules of the Laws of the State of Maryland. See act of congress, September 24th, 1789, vol. 4. p. 47. and Laws of Maryland, 1809, ch. 138. We are willing to allow to the prisoners every advantage which they could derive under a plea of not guilty, and not even by their own improper conduct to injure their cause.

Charles Mitchell, Esq.—The court will find on examination, that this is not one of the cases of standing mute mentioned in the act of congress, where they are to proceed as if the prisoners had pleaded *not guilty*. Those cases are specifically enumerated in the act of 1790, and this power is limited to the cases there specified; *robbery of the mail*, is not one of them. You must proceed then according to the law and practice of this state, at the date of the judiciary system. At that period the common law practice prevailed here; but the statute of Westminster, 1st. and the subsequent English statutes to 12 George 3d. providing for such cases, were never extended to this state. It was by statute alone that the English courts were enabled to punish him who stood mute as if he had pleaded guilty. At common law there was no such power. The utmost extent of common law punishment was *severe imprisonment until he pleaded*. Even the *pine-et forte* was a *statute* punishment. If the prisoners stand *obstinately mute*, therefore, it is a *casus omissus*. You have no power to try them, or to inflict capital punishment. But if an inquest is awarded to inquire *how* they stand mute, it will be ascertained that they do *not* stand *obstinately* mute, but have merely exerted a legal right to refuse to plead *because their arraignment was irregular* and against the law of the land. I do not intend, however, to enter into the discussion here. It was no part of my object in rising to address the court. I have merely said thus much to satisfy the court, that whether our conclusions are well or ill-founded, we have some plausible reasons at least for the course we have adopted, and have not been impelled by a wan-

BALTI-
MORE,
May, 1818.

United States
v.
Harc.

BALTI-
MORE,
May, 1818.

United States
v.
Hare.

tion desire to embarrass the court without any prospect of advantage to our clients. We had indeed indulged the hope that the court knew us too well to render such an assurance or explanation necessary; but the unusual, unexpected, and extraordinary appeal from the district attorney has extorted these remarks where we should otherwise have been silent. The gentleman has charged us with *obstructing the course of justice*, and vehemently asks if such conduct is to be tolerated here, which in the courts of Great Britain would subject us to fine and imprisonment. Sir, I deny the law to be so in England as he stated it, and whenever he feels disposed to enter into that question, shall be ready to meet him; but if it were so there, I desire to bless God and those who purchased our inestimable privileges with their blood, that our situation in this court is not so humble and degraded. Has the gentleman forgotten, sir, that while in England the accused is denied the aid of counsel altogether, except on questions of law, and then receives it as pure bounty from the court—here, he has a legal—nay, a constitutional right to be heard and advised by counsel in every stage of the proceedings against him; that while in the criminal courts of England the counsel for the prisoner is the mere creature, the automaton, the very *serf* of the court, holding his place by a base and servile tenure—here, he is an independent officer of the constitution, standing erect and firm on his constitutional freehold, and accountable to God and his conscience alone for whatever advice he may give his client. Execrated let him be, and forever abhorred by his professional brethren, who shall meanly shrink from the sacred duties he has to perform, or tamely suffer the interposition of any judge or court between him and his client. Sir, we have deemed it a legal right of the prisoners to refuse to plead; we have thought it might be beneficial to them; and with these impressions, if we had not advised, or having advised, were afraid to avow it, should we not merit the blasting mildew of public reproach which would inevitably fall upon us after the warring passions of the multitude against these prisoners shall have abated? We have advised our clients to insist on every legal advantage in defence of their lives, and here openly avow it, fearless of consequences. Our object is to save them from punishment, if not legally obnoxious to it, whatever may be their moral guilt; and this cannot be censured in counsel but by those whose unhallowed thirst for blood must be slaked in spite of the constitution and the laws of their country.

David Hoffman, Esq.—I shall solicit your Honours' indulgence, while I briefly state our views as to the operation of the course adopted by the prisoners—viz. their standing mute.

The indictment in these cases is predicated on the 19th section of the act of congress, 1810. This provides, that if any person shall rob any carrier of, or other person entrusted with, the mail of the United States, of such mail, or a part thereof, such offender shall be imprisoned, not exceeding ten years; and if in effecting such robbery he shall wound the person having custody of the mail, or put his life in jeopardy, by the use of dangerous weapons, such offender shall suffer death.

The robbery of the mail, whether by mere putting in fear, wounding, or placing life in jeopardy, is an offence against the United

States, originating in this act of congress. Its legal criminality, as a specific crime or public wrong against the union, is derived solely from this source. In this act we find no provision whatever on the subject of standing mute, nor do we find that any other act of congress has legislated on the subject, except the act relative to crimes and punishments of 1790, section 30, which surely can in no way apply or be extended to the present case, since that act provides for the case of standing mute *only* on indictments for crimes enumerated in that act. The present must therefore be a clear *casus omissus*; for the act of 1790 enumerates a variety of public wrongs, such as treason, piracy, perjury, bribery, forgery, falsifying of records, &c. &c., and constitutes these crimes against the United States. It then provides, that if "any person or persons be indicted of any of the offences herein set forth, for which the punishment is declared to be death, if he or they shall stand mute or will not answer the indictment, or challenge peremptorily above the number of twenty persons of the jury; the court in any of the cases aforesaid shall, notwithstanding, proceed to the trial, as if he or they had pleaded not guilty, and render judgment thereon accordingly." Mail robbery, it is to be observed, is not one of the crimes enumerated in this act, but is an offence created by statute twenty years after. The power of the court to proceed to trial on the prisoner's standing mute is given by no other statute than the act of 1790, and this, as we have seen, only where the prisoner is indicted for a crime enumerated in that act. As this is not there to be found, but originates in a law long subsequent, the legal *sequitur* to us appears to be that the present is a case at common law, wholly unaffected by the act of 1790.

The provision relative to standing mute, contained in the 30th section of the law of 1790, surely will not be extended to the offence made a crime by the act of 1810; inasmuch as it is a principle of law, that a statute which takes away a common law remedy or privilege ought never to have an equitable construction. 10 Mod. 282. And it is laid down that if the words of a statute do not extend to a mischief which rarely happens, they shall not be extended by an equitable construction, to that mischief, but the case shall be considered as a *casus omissus*. Vaugh. 373. As, therefore, the act of 1810, on which the indictment is founded, contains no provision for the case of standing mute, and as the common law operation of standing mute appears to have been recognized by congress, and as the act of 1790 is the only statute speaking on the subject, and this extends expressly to the offences *herein specified*, and as its provision ought not to be extended by equitable construction, it appears to me a sound and legitimate conclusion that the present, as I have just stated, is a case of standing mute at common law, and as such is to be dealt with differently from the case of an indictment for treason, piracy, &c.

What then is to be the proceeding of this court, if the view I have just taken, and I hope with great deference, be correct? The books on this subject say that if a prisoner on his arraignment stand mute, the court *ex officio* must ascertain, by a jury, whether this proceed *ex visitatione Dei*, or *ex malitia*. On the verdict of this jury a judgment of mute is to be entered; and if it be decided that

BALTI
MORE,
May, 1818.

United States
v.
Hare.

BALTI-
MORE,
May, 1818.

United States
v.
Hare.

the muteness be from the visitation of God, the court shall proceed to the trial as if he had pleaded not guilty. This power, it will be perceived, is only in case the muteness be *ex visitatione Dei*, vide 2 Hale's P. C. 317. 15 Vin. Abr. 532. And on this judgment, the better opinion appears to be that no sentence of death can be given. 2. Hale's P. C. 317. 4 Black. Com. 324.

If the decision be that the prisoner is mute *ex malitia*, that is, obstinately, and he stands indicted for a felony, he can neither be *tried* nor *convicted*. He cannot be tried, because there is no *issue*, for there can be no *issue* without a *plea*, and, as we shall presently see, the judgment of *piene forte et dure* was introduced to extort a plea. Nor can such a prisoner be *convicted*, because standing mute amounts to conviction only in felonies of the highest and lowest degree, viz. in treason and petit larceny: so that *quacunque via data*, we cannot perceive how the prisoners in the present case can receive sentence of death; since the muteness, if supernatural, cannot be followed up by a judgment of death, and if from obstinacy, it is equally so, as there can be neither verdict nor conviction. 4 Black. Com. 325.

It may be proper here to note an error of the learned district attorney, who in his observations just addressed to the court, states it to be undoubted law, that standing mute in all cases, from the highest to the lowest crimes, amounts to conviction, and that the courts of England, for centuries past, have considered it so. The law I apprehend is not so. Standing mute amounts to conviction only in the highest and lowest crimes, viz. treason and petit larceny; and not as the gentleman has asserted, from the highest to the lowest. Prior to the statute 12 George III. c. 20. (which can have no operation in this court, and therefore is to be wholly disregarded) standing mute on indictments for any felony, other than treason and petit larceny, was uniformly followed, not by conviction, but by the judgment of penance. The books are so explicit on this point as to render misapprehension scarcely possible. Disingenuousness in stating the law is at all times censurable; but in a state-officer, prosecuting in a case affecting the most dear and most valuable possession we have—*life*, it is surely doubly reprehensible.

The crime, then, for which these prisoners stand indicted, being neither treason nor petit larceny, nor a crime affected by the 30th section of the act of 1790, which authorizes the court to proceed to trial in certain cases of standing mute, the present must be a case in which, in England, prior to the statute 12 George III. the court would have proceeded to the sentence of penance, or *piene forte et dure*. Admitting, then, that had this case occurred in the court of king's bench, prior to the statute 12 George III. the court would have awarded penance as the only means within their control, and conceding, *gratia argumenti*, this court to possess the power of awarding this terrible judgment, is the court *now* in a situation to pronounce such a judgment? Has there been that preliminary procedure, which forms the legal foundation for such a judgment? Has there been a jury impanelled to pronounce whether this muteness were obstinate, or by visitation of God? Has there been a judgment of mute? Farther, the books say, that a mute prisoner is entitled to a respite for reflection. The sentence of penance

is to be solemnly read to him, that he may be fully apprized of his danger. He is then to receive the *trina admonitio*. 15 Viner's Abr. 532. Staunf. P. C. 149. None of these formalities have taken place, so that if the court possess the power to award penance, as would unquestionably have been the only power of the court of king's bench, anterior to the 12 George III., the exertions of this power should have preceded the forms just stated.

Let us now briefly examine, whether this court can be considered as possessed of the power awarding any such sentence. Such a power can be derived only from

1. The common law of England.
 2. The statutes of England.
 3. The acts of congress.
 4. The acts of Assembly of the state of Maryland.
1. Admitting for argument, this court in some cases to be guided by the English common law, the common law could give this court no such power, as the power itself in England is not derived from the common law, but from the statute of Westminster, 1. 3 Edw. 1. vide Barrington on Statute, 62. 4 Bl. Com. 327. Pref. to 1 vol state trials, XII.
 2. There are no statutes of England, either prior to or since the declaration of independence, of any force or operation whatever, in any of the courts of the United States, so that we need not seek for this power in this source.
 3. It will not be pretended that any act of congress has legislated on the subject.
 4. Nor has any act of assembly of this state any provision whatever, relative to this judgment of penance, and the statutes of Westminster, 1. 3 Edw. has not been considered as extending to this state. Vide Kilty's Report of British statutes.

The case under consideration appears, therefore, to be one in which the prisoner can be made responsible, if at all, only under the 3d count of this indictment, which is for an offence *not capital*. If these men be guilty of a crime which forfeits their lives, it may be a matter of regret that they cannot be amenable to the punishment so manifestly intended. But if the law be defective, let it be amended by the national legislature.

The *piene forte et dure* was introduced in feudal times for the purpose of extorting a plea in capital cases, so that if death ensued, there might be a *forfeiture* or *escheat* of the prisoner's lands. But if there were no plea, corruption of blood, forfeiture, nor escheat could ensue.

Finally, the prisoners in the present case stand mute. Can this court proceed to judgment as on a confession or conviction? We apprehend not, as standing mute is equivalent to conviction only in treason and petit larceny, and the statute 12 George III. which renders standing mute in all cases a constructive confession, cannot alter the law of the case in this court. Can the court enter the plea of not guilty for the prisoners? We presume not, for even criminals have their rights; they cannot be forced to plead. Can this court proceed to trial as if the prisoners had pleaded not guilty? We humbly conceive not, as such a power is nowhere given but

BALTIMORE,
May, 1818.

United States
v.
Hare.

BALTI-
MORE,
May, 1818.

United States
v.
Hare.

in the act of 1790, and there only in the cases of crimes therein specified.

If the views I have thus briefly, hastily, and even to myself, unexpectedly taken, be not wholly unsound, I earnestly and respectfully entreat the court to accord to it some consideration, and in favour of life, not to proceed but with great caution and consideration.

Thomas Kell, Esq.—On the part of the prosecution, addressed the court as follows:—It is sufficient for me to consider this case as I find it to be.—Having heretofore taken no other part therein than suggesting the propriety of the prisoners' counsel intimating to the court how the prisoners intended to plead when they asked leave to withdraw their first pleas, I saw, or thought I saw that some delay, if not difficulty, might arise from the course then proposed. That permission, however, having been given unrestricted, they may exercise whatever right they possess in such way as they deem best; either by pleading to the indictment, or refusing to plead and standing mute; the latter they have preferred, and we are now to inquire what is to be done. Can it be conceived that the court is here to stop; that your authority is suspended; your jurisdiction and cognizance of this offence restrained by the silence of the accused. If so, every offender would find it his interest to be silent too, if thereby he could avoid your power and authority to reach him or his offence. Is it possible seriously to think so great an anomaly can exist in the law?

What is to be done? You cannot make the man speak; the common law does not reach him in this court, and his right to be silent is not derived from that law; in standing mute, he exercises a right derived from nature and his Maker. But is he not to be tried? is he to go unpunished if guilty? I answer, no; there is no difficulty in the course to be adopted by the court.

If this case is embraced by the act of congress regulating the trial of criminal offences, and I contend it is, then the way is clear, and the provisions of that act point out the course. Mr. Kell then read the 29th and 30th sections of the act of congress relating to crimes.

"Sec. 29. *And be it enacted*, That any person who shall be accused and indicted of treason, shall have a copy of the indictment and a list of the jury and witnesses, to be produced on the trial for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors delivered unto him at least three entire days before he shall be tried for the same, and in other capital offences shall have such copy of the indictment and list of the jury two entire days at least before the trial. And that every person so accused and indicted for any of the crimes aforesaid, shall also be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required, immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all reasonable hours; and every such person or persons accused or indicted of the crimes aforesaid, shall be allowed and admitted in his said defence

to make any proof that he or they can produce, by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them.

"Sec. 39. *And be it further enacted*, That if any person or persons be indicted of treason against the United States, and shall stand mute or refuse to plead, or shall challenge peremptorily above the number of thirty five of the jury; or if any person or persons be indicted of any other of the offences herein before set forth, for which the punishment is declared to be death, if he or they shall also stand mute or will not answer to the indictment, or shall challenge peremptorily above the number of twenty persons of the jury; the court in any of the cases aforesaid, shall notwithstanding proceed to the trial of the person or persons so standing mute or challenging, as if he or they had pleaded not guilty, and render judgment thereon accordingly."

He then proceeded.—It cannot be doubted that the language of the 29th section embraces this case; after directing the providing in a case of treason, it directs, "and in other capital offences," certain proceedings preparatory to the trial shall be had; this is a capital offence, and the directions given in the section apply to it; it is farther provided that "every person so accused and indicted, for any of the crimes aforesaid," shall have the benefit of counsel; and farther, that "every person accused or indicted for any of the crimes aforesaid," shall be allowed the benefit of their witnesses, and process to compel their attendance. Is it not the just construction, that the terms "*any of the crimes aforesaid*," in which the benefit of counsel is allowed; and also that the words "*the crimes aforesaid*," in which the benefit of witnesses is allowed, relate and refer as well to the "*other capital offences*," embraced in the second provision of the section, as to the offences previously named in the act? Is it not also true, that by the terms "*other capital offences*" used in this section, is meant and included *all* capital offences, not those only which are previously mentioned in the act, but such also as might be subsequently declared. The unlimited sense and meaning of the terms embrace all; and there is nothing to restrict them to those offences only, which are previously designated in the act. Again; if these different provisions of the section are made to relate only to the offences specified in this act of congress, what becomes of the prisoner's benefit and right of challenge, or the privilege of his counsel? If the construction I ask for be wrong, they would soon have to become as *mute* as their clients; the construction I contend for secures those privileges; they are not given by the post office law, which creates the prisoner's offence.

The 30th section, after providing for a refusal to plead or too great a challenge in case of treason, provides that "if any person be indicted of any other of the offences herein before set forth, for which the punishment is declared to be death, if such person stand mute or challenge above twenty jurors, the court shall proceed as if the accused had pleaded not guilty." Upon this provision I insist that the language, "any other of the offences herein before

BALTI-
MORE,
May, 1818.

United States
v.
Hare.

BALTI-
MORE,
May, 1812.

United States

v.
Hare.

set forth for which the punishment is declared to be death," ought not to be restricted to those offences only which are created by this statute; that the language and meaning relate as well to those offences set forth in the 29th section, by the description "other capital offences," that this description contains, and is a setting forth all capital offences, and all such are thus brought within the provisions of this section, if the punishment be death, which is the case in this present instance. The act of congress presents one continuing system regulating criminal trials, and offences created since its passage are equally affected by it as if they had existed before. It is the law operating to day as if but just enacted.

The construction thus contended for is the more lenient and favourable to the accused; and if hereafter we should have any discussion about the right of challenge, the gentlemen, his counsel, will have to claim my construction to show that right; it cannot be found unless this case be within the provisions of these sections; this right and several others are not given by any other law.

If I am right in the view I have submitted of this subject, the course to be pursued is quite plain; it is to proceed in the trial as if the prisoner had pleaded not guilty, that being directed by the statute.

But if I am wrong in this view, and if the provisions of this act should be held not to govern this case, (which I do not apprehend,) and the authority of the common law be absent here, I ask again, is the offence, if committed, to pass unpunished? Is there no power to try him? I reply there is. This court possesses (by the law creating its powers) jurisdiction over this man and his offence. You have cognizance of, and authority to try the offence, (see the 11th section of the judiciary act,) and the only question can be, how is this authority to be applied? the man chooses to be silent, he will not plead, and there is no power to make him; yet there is power to try him. It is in vain to say he cannot be tried because he stands mute. The court rightfully may, and no doubt will go on to try him in such way as will not infringe any right secured to him by the constitution and laws of the government. Looking to these for their direction, (if the case be not regulated by the 29th and 30th sections before read,) the court will settle the forms of proceeding; the trial by jury with all its benefits will be preserved to him as secured by the constitution. See 8th article of the first amendment

If the court proceed with any analogy to the state practice, it would be by entering the plea of not guilty for the prisoner, that being the course directed by the statute of Maryland in similar cases. If with reference to other cases under the act of congress, the trial would progress as if he had pleaded not guilty; there being no issue joined in the case, the substance, if not the form of the jurors' oath would be to try whether the prisoner be guilty of the matters whereof he stands indicted, or not guilty; in framing the oath there can be no difficulty.

But we are told that this is a *casus omissus* in the law; it may be so in the letter of the statute, but surely it is not such in the meaning or reason of it. There is no *casus omissus* in your cognizance of the offence, or right to try the offender; and if there

was no particular form of trial prescribed by law, the court could, and ought to supply it, otherwise your jurisdiction over the offence would be vain. I might enumerate many instances of this sort of difficulty; suppose some of the jury were to die after being summoned, or whilst attending the court, here would be another "*casus omissus*," in the letter of the statute; but do the gentlemen or any one else doubt the power of the court to have others summoned.

It would be strange indeed if it were thus in the power of a prisoner to arrest his trial, and paralyze your cognizance and jurisdiction of his offence.

Hence, sirs, I submit whether there be any thing to prevent the trial from going on, and conclude that it must progress as if the prisoner had plead in chief to the charge against him.

Per Curiam.—The two first named when arraigned, severally pleaded not guilty, the third pleaded not guilty, and also put in a plea to the jurisdiction of the court.

The attorney for the United States objected to the double plea put in by Alexander; but it being after the hour of adjournment, the court adjourned till the next day, when the prisoners again being severally arraigned, Mr. Mitchell, one of their counsel, asked leave to withdraw their pleas, intimating that he did not then know what to advise his clients to plead. In order to give the accused full opportunity to make their defence, the court granted leave accordingly, under the impression that their counsel meant to plead other pleas. The accused being severally called on to answer; were advised by their counsel to stand mute, and thus did stand mute; thus refusing to plead.

The attorney for the United States, moved the court to proceed to the trial in the same manner, as if the accused had pleaded not guilty, according to the 29th section of the act for the punishment of certain crimes against the United States. To this the counsel for the prisoners objected, contending that this mode of proceeding was applicable only to the trial of the crimes specified in the act for the punishment of certain crimes against the United States, and could not be extended by construction to the crime of robbing the mail, made capital by an act of congress subsequently passed.

On the part of the prosecution it was argued, that by the act to establish the judicial courts of the United States, full power and authority are given to the circuit courts of the United States to try all crimes and offences cognizable under the authority of the United States, and that the manner of conducting the trial prescribed by the 29th section of the act, for the punishment of certain crimes is applicable to all cases arising under laws subsequently passed, inflicting the punishment of death for the commission of any crime or offence. That standing mute by a criminal accused of a capital offence amounts to a constructive confession of guilt. That the privileges of a person accused of a capital offence, by the 20th section of the same act are general, and extend to the trial of all crimes made capital, whether specified in that act or not, and that the mode of trial must be the same. That by the 34th section of the act to establish the judicial courts of the United States, which provides that the laws of the several states, except when the constitu-

BALTI-
MORE,
May, 1818.

United States
v.
Hare.

BALTI-
MORE,
May, 1818.

United States
v.
Hare.

lue of five shillings sterling, and horse stealing are made felony and punishable with death; and if the accused shall stand mute, &c. the court may pronounce sentence against him. By the act of 1777 c. 20. if a person indicted for high treason shall stand mute, &c. the court may pronounce sentence of death against him, and all his estate is forfeited. The chancellor of the state in his report in pursuance of the directions of the legislature of English statutes, adopted and made applicable to Maryland, includes the statute of 12 Geo. 3. c. 20, by which standing mute in all cases of felony and piracy is equivalent to conviction.

No new offence is created by the act of congress regulating the post office establishment. Robbing is the *generic* term, and robbing is felony at the common law, and punishable as such. The state of Maryland, by an act passed in the year 1809, has adopted in substance, and almost in words, the provisions of the 29th section of the act of congress to punish certain crimes. It is provided by that act that in all cases of treason or felony, if the person accused shall stand mute, or will not answer to the indictment, the court shall proceed to the trial, as if he had pleaded not guilty, and given judgment accordingly. Hence it appears, that if the laws of the United States have not provided for the case, and the laws of Maryland are to be regarded as the rule of decisions, standing mute prior to the year 1809, would be equivalent to conviction. Subsequent to that period the trial would proceed as if the accused had pleaded not guilty.

The court orders that the trial proceed by jury, as if the prisoner had pleaded not guilty.

The court then appointed Saturday for the trial of the prisoners.

Saturday, May 9.—After the prisoner was placed in the bar for trial, General Winder made the following observations:

In the case now called it was with the greatest reluctance that he was compelled to ask the court for a delay of the trial until Monday; he was bound to ask this in justice to the person charged, and on account of the novelty of the case involving much law not heretofore discussed. He was decidedly of opinion that the prisoner ought to plead, but he was doubtful what plea it became him, as counsel, to advise him to put in. The delay asked for involved little or no inconvenience to the public. On Monday the counsel for the prisoner will come prepared. The indulgence he asked for he deemed not unreasonable; by this short postponement an opportunity would be given for counsel to speak as advisedly as counsel ought in a case which involves the life of their client. On Monday the counsel for the prisoner will be prepared to proceed in the trial.

Mr. *Wirt*, in reply to General Winder, observed that although the postponement of the trial till Monday would be inconvenient to him, yet he considered his own inconvenience of no importance in the decision of this motion; but the court would recollect that there were other public officers of the government, attending as witnesses, to whom the delay might be still more inconvenient; that there were besides private witnesses attending at a great distance, and probably with great inconvenience to their private

affairs; that the counsel previously engaged by the prisoner, (three or four in number,) had already had the most ample time for preparation; that it was the prisoner's own fault that General Winder had not been called in at an earlier day; that this very recent engagement of that gentleman might be well suspected to form part of a system of dilatory defence, calculated to defeat the trial at this term; and he submitted it to the court, whether the conduct of the prisoners, in the previous stages of this cause, had been such as entitled them to the indulgence which was now asked.

General Winder, in reply, said he felt for the inconvenience of the public officers and others attending on the trial, but the delay asked for was a very short one. This day was an inconvenient one to commence a trial which might not be finished until to-morrow, which would be Sunday; he considered that nothing which had occurred in the proceedings in this case ought to operate, and he trusted would not operate against the prisoner having a fair and impartial trial. The situation of the prisoner claims some indulgence. His life is at stake, and it is natural and excusable that he should endeavor to avert his fate, and no attempt to do this ought to deprive him of full opportunity of a fair trial. Surely this ought not, and cannot make an impression unfavourable to him. For himself, General Winder said, at this moment he was totally unprepared to advise the prisoner, and he trusted the postponement asked for, only until Monday, would be granted.

Mr. Wirt wished the court to understand distinctly that he was perfectly willing to assent to the indulgence asked by General Winder, so far as his own personal inconvenience was involved in the proposition. That the assurance now so explicitly given by General Winder, that the trial should proceed on Monday, was entirely satisfactory to him, as one of the prosecution; and that for the sake of affording the most ample opportunity of defence in a case of life and death, he begged to be understood as giving his assent, so far as that could avail to General Winder's motion.

The Court. We are of opinion that ample time has been allowed. If the prisoner sustains any inconvenience he has brought it on himself:—the trial must go on.

The clerk then commenced to call the jury.

General Winder asked the court, if they did not understand him that on Monday the counsel for the prisoner would advise him to plead. If they did not so understand him, he wished it now to be so understood.

Mr. Glenn, the district attorney, observed, that he was disposed under this pledge that the cause be postponed.

The court. It is of no importance whether a plea will be put in or not, as the court have decided that they will proceed as though a plea of not guilty had been entered.

Mr. Mitchell thought it proper to bring distinctly to the notice of the court at this stage of the proceedings, *one fact*, to which he apprehended sufficient importance had not been attached, although it could not entirely have escaped the eye of the court. Their honours must have been aware that *no copy* of the indictment could have been delivered to the prisoners or their counsel, pursuant to the

BALTIMORE,
May, 1818.

United States
v.
Harc.

BALTI-
MORE,
May, 1818.

United States
v.
Harc.

act of congress, *two days previous to the arraignment*. In truth, no copy had been delivered at all, and the prisoner's counsel had no knowledge of the nature of the charge *at the time of the arraignment*, (within two hours of the indictment found,) except what might be derived from hearing the indictment once read by the clerk, and it was utterly impossible for them advisedly to plead *instantly*, according to the requisition of the court, in a case so vitally interesting to their client. They were far from being disposed to impede the *regular* course of justice, but were not authorized to dispense with that course, and they had refused to plead, not merely because they were unprepared, but also because pleading in chief was deemed a waiver of their legal right to a copy altogether. This had been often decided as he was prepared to show the court, and even if it were not a legal waiver, it was a virtual renunciation of the privilege secured by the act of congress; for of what possible use could a copy of the indictment be to the accused after pleading in chief? he could neither avail himself of a demurrer, a plea to the jurisdiction, nor of *autrefois acquit*. The act of congress is imperative. The accused *shall* have a copy of the indictment two days at least previous to the trial. The arraignment is a part of the trial. The act is a literal transcript from the English statutes, 7 Will. III, and 7 Anne, differing only in the number of days. In both these statutes, the word *trial* alone is used, and the English courts have uniformly considered the arraignment as a branch of the trial in their construction of these statutes. If the court have the least doubt on this point, they shall be abundantly satisfied by authority; for there is no contradiction in the books on this subject.*

**Mr. Mitchell*, has furnished the Reporter with his notes and references on this subject, which are annexed.—viz.

"Any person who shall be accused and indicted for treason, shall have a copy of the indictment and a list of the jury and witnesses, &c., delivered unto him, at least three entire days before he shall be tried for the same; and in other capital offences, shall have such copy of the indictment and list of the jury, two entire days at least *before the trial*.—Act of Congress, April 30, 1790. vol. i. p. 100, sec. 29.

By the English statute, 7 Will. III. chap. 3. sec. 1. it is enacted, "that every person that shall be indicted for high treason, &c. shall have a true copy of the whole indictment, &c., delivered to him five days at least *before he shall be tried* for the same. 2 Hawk. P. C. ch. 39. sec. 14. p. 567.

By the statute 7 Anne, chap. 21. sec. 11, it is provided, that "copies of all indictments for high treason, &c. with a list of the witnesses, jurors, &c., shall be delivered to the party indicted ten days *before the trial*." 2 Hawk. *ibid*. sec. 16.

In the margin 2 Hawk. ch. 39. sec. 14. there is this remark on the words "*before the trial*," above recited. "This must be intended five days before *arraignment*, because the prisoner pleads *instantly* upon the arraignment." See Lord George Gordon's case, (accord) Doug. 591.

"As the intention of this clause in granting a copy of the indictment is merely for the sake of enabling the person indicted to plead, it has been holden, that no person *after having pleaded* to an indict-

Upon these grounds the counsel did advise the prisoners that they were under no obligation to plead *instanter*, upon their arraignment. They had a legal right to refuse to plead, and cannot be deemed by the

BALTI-
MORE,
May, 1812.

ment, is entitled to have a copy thereof."—6 Gwill. Bac. Ab. 545. *Ty. Treason* (Cc.)

United States

"No exception can be taken to the fulness of a copy of the indictment after the indictment has been pleaded to."—Rookwood's Case, 4, State Trials, 646."

v.
Hare.

N. B.—One of the copies *actually delivered* in these cases was *essentially variant from those on file*, by omitting technical words, the omission of which would have been fatal after verdict, but according to the course adopted, the party had no opportunity to raise this objection. The other copies did not come to the hands of the counsel.

"If the prisoner *pleadeth* without a copy of the *caption*, &c. he is too late to make that objection, or indeed any other objection that *turneth upon a defect in the copy*; for by *pleading* he *admitteth that he hath had a copy sufficient for the purposes intended by the act*."—Foster, ch. III. page 230.

"By the letter of the act, the copy is to be delivered five days *before the trial*. But upon the true construction of it, the copy, after the bill is found, for till then it is no indictment, ought to be delivered five days before the day of arraignment, for that is the prisoner's time for pleading. And the five days must be exclusive of the day of delivery and the day of arraignment. So with regard to a copy of the panel, &c. *These points have been long settled, and are now matters of constant practice*."—Foster, 230.

By necessary construction the ten days mentioned in the statute, 7 Anne, ch. 21. s. 11. must be reckoned after the bill is found, and *before the arraignment* of the prisoner; for until the finding of the bill there is no indictment, and upon the arraignment, the prisoner must plead *instanter*.—1 Chit. C. L. 405—1 East's P. of the C. 112.

These ten days must be reckoned exclusive of the day of delivery and of arraignment, and also, exclusive of an intervening Sunday.—1 Chit. 405.—Foster, 230.—1 East. P. C. 112.

"After pleading, it is too late to object either to the *want* of a copy, or to an insufficiency in it; for that admits it to be sufficient."—1 East, P. C. 113. cites Gregg's case, 12th January, 1707. MSS.—Cook's case, Salk 634. Cases of Rookwood and others, 4 State Trials, 661—And case of May, alias Smith, and others, April, 1708.

In Cook's case, Salk 634, after jury called; Sir B. Shower, counsel for the prisoner, objected to the trial at that time, because he had not received a copy. The court replied, that the object of the act of 7 W. 3. was to enable the prisoner to plead from the copy "*and till then he is not to plead*" In this case he has pleaded. *Therefore this benefit is waived, and the prisoner has admitted he has a copy, and did not think it for his service to require it; but was able to plead without the help of it.*"

N. B. The act of 7 Will. 3. made it necessary for the prisoner or his counsel to demand a copy. This was altered by the stat. 7 Anne, from which the act of congress is copied.

In Dr. Hensley's case, 1 Burr, 643, the indictment was brought into court on Tuesday, 2d May. He was not arraigned until the succeeding Monday, May 8th; five days having been allowed for the service of a copy of the indictment, pursuant to the act, 7 Will. 3. and he was allowed until Monday the 12th of June following; more than a month, by lord

BALTI-
MORE,
May, 1818.

United States
v.
Hare.

court, standing wilfully mute; nor ought this exercise of a legal right, to debar them from any indulgences which the court might otherwise feel disposed to extend. As well might they provoke the court by refusing to plead *guilty*. At present we are not prepared to advise the prisoners, nor to undertake their defence, in justice to them, or to ourselves. For my own part, I can assure the learned attorney general, that I came into the cases after the indictment was found, and only an hour previous to the arraignment; and that I know of no other systematic delay but what proceeds from a fixed purpose to obtain a fair trial according to the constitution and laws of the land. I am sorry *their* provisions seem too dilatory in a case involving the life of the citizen.

Mr. Kell said, on the part of the government, the attorney general and the district attorney, the gentlemen may now enter a plea in chief.

In reply to *Mr. Kell*, *Mr. Mitchell* observed, that the arraignment was altogether irregular and illegal, directly in the teeth of a public act of congress, of which the district attorney was bound to take notice; that it would certainly have been deemed an act of supererogation on the part of the prisoner's counsel to have volunteered an advice or information to the district attorney, apprizing him how he could regularly convict their clients. Here was no ground to presume mistake or surprise, for he could not but know that two days had not elapsed between the indictment and the arraignment:

Mr. Glenn, the district attorney, said the gentleman ought to know that the prisoners were arraigned by the order of the court, that he had nothing to do with it, and that all the proceedings were by their order.

The Court observed, that the whole proceedings have been strictly regular, and they were satisfied they had given the prisoners all the privileges they were entitled to; and they meant to allow them all the privileges and advantages they can legally require.

The clerk proceeded in swearing the jury, and after three of the jury were sworn,

General Winder addressed the court to the following effect: He thought proper to state, that he was himself entirely unprepared, as to what advice he ought to give the prisoner in the present situation of the trial, from want of opportunity to examine, and consider the subject; and this also is the situation of the other gentlemen concerned for the prisoner; they, therefore, with himself, desire it to be understood that they no longer consider themselves as taking a part in this trial.

Jury Sworn, viz:—John Kennedy, Robert N. Moale, John Robinson, John Carter, John Watson, Thomas W. Peyton, John Snyder, Isaac Dickson, Thomas W. Bond, Thomas Wooden, Richard B. Dorsey, Geo. Timanus.

Mr. Glenn, (district attorney) opened the case to the jury, by detailing the facts that would be proven, which could not leave a doubt on the minds of the jury, as to the guilt of the prisoner. He then read the law,

Mansfield, to prepare for his trial, without any application on his part whatever.

It appears, then, that according to the established construction of the words contained in the act of congress, if a copy of the indictment had been actually served on the prisoners the same day the indictment was found, viz. Monday, May 4, they could not have been regularly arraigned until Thursday, May 7th.

under which the prisoner was indicted, which is in the following words:—

Act of April 30th, 1810. Sec. 19. "That if any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders, shall on conviction, be imprisoned not exceeding ten years; and if convicted a second time of a like offence, he or they shall suffer death: or if in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death."

The following witnesses were then examined.

David Boyer sworn.—I was driving up the mail between 10 and 11 o'clock on the night of the 11th March, Mr. Ludlow was with me, a fence was across the road which stopt the leaders, three men came from behind it, and said "here we are, three of us, highway robbers, armed with double barrelled pistols and dirks." They took us into the woods and tied us. They then went to the waggon and drove it into the woods; after which one man jumped into the waggon, and threw the mail on the ground, and put a knife into it, and they went to work; they were at work for a long time opening the letters. When they were done, they untied us, and told us to turn our backs to the tail of the waggon, which we did, and they tied us there. One of them said, "driver I am sorry you have been kept so long, here is some money for you to buy bitters." He gave me ten dollars, and said the person that was along with me looked like a gentleman, and did not want any money. Each one had a pistol when they tied us; they asked me which was the fastest horses. Their faces looked black, but from their hands I saw they were white men, and they called each other by the names Gibson, Johnson and Smith. One of them said, what shall we do with these men; another answered, I know how to fix them. I was anxious to know. This alarmed me very much. I gave up the mail because I was afraid of my life; they did not say they would kill us. I was much alarmed, because I did not know what moment they would kill us. They went off on the horses. After some time the witness released himself with his teeth, and with Mr. Ludlow proceeded to Havre-de-Grace.

Thomas Ludlow, Esq. sworn.—I left Baltimore on the 11th March last, in the mail waggon. When within two miles of Havre-de-Grace, our progress was impeded by a fence built across the road. Upon driving up to the fence, three men jumped from behind it, on the right side of the road, presented pistols which were cocked; said they were highway robbers, and would blow our brains out if we made any resistance. I with the driver was then led into the woods, about sixty yards from the road, and tied to a tree. One of the men returned to the road and brought the mail waggon into the woods, and removed the fence from the road. The mail was then cut open, and the letters taken out, and a great number of bank notes found in them. They occupied about three hours and a half in searching the letters. The men searched us in the waggon, to ascertain if we had arms. After they had finished searching the mail, about two o'clock in the morning, the driver and myself were untied from the tree, and tied to the back of the

BALTI-
MORE,
May, 1818.
~~~~~  
United States  
v.  
Hare.

BALTI-  
MORE,  
May, 1818.

United States

v.

Hare.

waggon. The horses were then taken from the waggon, and they galloped off towards Baltimore. The driver and I, after releasing ourselves from the waggon, proceeded immediately to Havre-de-Grace. After the prisoner was taken up, I returned to Baltimore, and went to the jail to see him. I had no recollection of his face, in consequence of its being blackened on the night of the robbery; but I very distinctly recognized his voice, which is peculiar. They used a phosphorus light to look at my watch; one remarked to the man who was looking at my watch that he was a fool, as I should see his face, but he put his hat over his face, so that I could not distinguish it.

*Mr. Wirt.*—Was the life of the driver in your opinion, sir, put in jeopardy?

*Witness.*—I beg leave to decline answering that question, unless the court should be of opinion that I am compelled to do so. The court decided the witness was compelled to answer the question.

*Witness.*—I did consider that the life of the driver was in danger had he made any resistance.

*Boyer* was called, by one of the counsel, on the part of the prosecution, and asked under what impression he gave up the mail; he repeated a part of the testimony, and added, I was a good deal alarmed; and when one of them said, what shall we do with these men, and the other answered I have got a way to fix them. I was very much alarmed indeed. I did not hear them say they would blow our brains out if we made resistance.

*Jacob Rogers, Hatter, sworn.*—The prisoner, with another man, pretty early in the morning on which he was arrested, came into my shop, and bought each a hat, and asked where they could get ready made clothes. I sent them to Berteau and Dumas's store. They had a great deal of money, in one, two and three dollars; it appeared to me of notes from Maine to Georgia. I saw no big money. Each one paid for his hat. I picked out the notes they paid me for the hats, as I was afterwards requested to do. They then went to Berteau and Dumas's where they were detected.

*Peter Berteau, sworn.*—The prisoner came to my shop, about 8 o'clock on the morning of the 13th March, with another man, both badly dressed. I was alone. They asked me for blue frock coats. I asked if they wanted blue superfine ones; they answered, yes. The prisoner went to the door, where there were two Scotch plaid cloaks, and asked the price. I told him 35 dollars a piece; he said he would give sixty for both. I said, as they would buy other clothes, he might have them. This was about the time when Mr. Dumas came down from his breakfast. I told him to look for a coat that would fit the youngest one. I told him in French that they were men that would buy, that they had already bought two cloaks for 60 dollars, and that I suspected they had the money of the mail, that had been robbed the day before, in their pockets. Dumas told me to say nothing about it, until we could see with what money they could pay their bills. About this time a constable came in, and asked me if I knew the object of his visit? He began to question the men. I took him apart, and told him we were not ready, and requested he should wait till we should be ready. They continued purchasing clothes; the constable came in a little after,

and without inquiring if we were ready, told them the mail had been robbed; it appears you are strangers in this place, and it is my duty to bring you before the court. They said they had not heard the mail was robbed. They went into the back shop, where Mr. Dumas had the clothes they had bought.

*Peter Dumas, sworn.*—It was on the 13th March last at about a quarter past eight o'clock in the morning, passing through our store I saw two men very commonly clothed, busy buying of my partner some clothing. Having previously read in the newspaper an account of the mail robbery, it came directly to my mind that there was all possibility of these men having executed this robbery. I passed my way to the back shop, my partner came to me and said, these are the mail robbers, they are buying a great deal. I directly answered very well, they are our's. After a moment's stay in the shop I came up to one of them, so as to help with the sale of the goods; seeing that every article offered was instantly bought. They never minded the prices; and what made me suspect them more, is that when asking them to try the pantaloons, they refused, telling me to take measure, and apply it to the pantaloons they had on. While in the act of taking measure, I felt a great abundance of papers in the pockets of the pantaloons, which induced me to be easy with them in all my endeavours, so as to bring those papers to light. I immediately let them at liberty to act as easy and freely as I would have done to any honest people. After a moment two officers came in, and asked them if they could give satisfactory references who they were, they answered in the affirmative; the officers said, we are officers, the mail has been robbed, and it is the duty of the people to take every person suspected, to be examined. One of them called for the bill; one bill was ready. I took them into the back shop, and counted out the goods. I placed myself opposite a large looking glass in the shop, that I might see. I saw one step behind the curtain which hangs on one side of the shop; he put his hands into his pocket, pulled out the money, and placed it between some cloth that had been cut out, and between some pantaloons that were lying on the counter; the other then emptied his pocket in the same way. One of them then asked me what they should do; I told them to go to court and be examined. When they had left the shop, I went to the clothes and took out the money they had deposited there, and took it up to court. When one of them was emptying his pocket, I heard a pistol ball and dagger fall, which I found on the floor. Both men had mud on their pantaloons as high as their knees, when they came into the store.

On leaving the store, one of them seized my right foot by laying his on it, knocking me with his elbow, and showing me with his eyes the place of deposit; leave the goods, said he, and I will call for them. I told the clerk, we have money enough in the house, and I called a gentleman passing to step in so as to witness, while taking possession of the money.

*Alexander H. Boyd, Esq. sworn.*—I was in the room where the prisoner was examined; this note (*a one hundred dollar note, which was afterwards proved to have been robbed from the mail.*) fell from him as he was pulling off his pantaloons; his person was much chafed.

BALTI-  
MORE,  
May, 1818.

United States  
v.  
Hare.

BALTI-  
MORE,  
May, 1818.

United States  
v.  
Hare.

*D. Bell, Jr.*—I put this note, (*the note above mentioned*) into the post office in Charleston, on the 4th March last. I also put into that office, at the same time, these notes, (*taking up some of the notes that were deposited among the clothes in the shop of Berteau and Dumas.*) These notes were directed to Churchman and Thomas, Philadelphia.

*Col. Bentalow*, the marshal, sworn.—I examined the prisoner, he was much chafed, as if he might have been riding on a bare-backed horse; this note was dropped from his pocket, which Mr. Boyd picked up; there was horse hair on the seat of his trowsers.

[Several witnesses were then called to prove that the notes found at Berteau and Dumas' store, where the same that were brought into court.]

*Andrew Rhoads*.—I saw the prisoners in Havre-de-Grace on the 11th March last, at 12 o'clock at noon, in the high road with two other men. They asked me how far it was to Baltimore. I told them. They then asked whether there were any bridges washed away between there and Baltimore? Whether stages came that way? I told them only the mail stage travelled that road; they asked me the time that it came, and I told them.

Here the testimony on the part of the United States closed. The prisoner produced no witnesses.

*Mr. Ludlow* was called, and asked if the prisoner had a pistol.

This man had a pistol; after we had left the road, he told me that if we made no resistance indeed not be alarmed, our lives should not be in danger.

*Thomas Kell, Esq.*—The testimony being closed, Mr. Kell addressed the court to the following effect:

He said that having now progressed through the evidence to be offered in the case, it was not the intention of the attorney general, the district attorney, or of himself, further to press the calamity of the prisoner by observations on the testimony. But they felt it incumbent upon them, and proper to relieve the jury from any doubt or difficulty, as to the law upon this subject. Whilst, therefore, they should decline saying any thing to induce the conclusion at which they had no doubt the jury would arrive, they would ask of the court the following direction:

"It is prayed of the court to give the following instruction to the jury.

That robbing the carrier of the mail of the United States, or other person entrusted therewith, of such mail, by stopping him on the highway, demanding the surrender of such mail, and at the same time showing weapons calculated to take his life, such as pistols or dirks, putting him in fear of his life, and obtaining possession of the mail by the means aforesaid, against the will of the carrier, is such a robbing of the mail, and such a putting the life of the carrier or person entrusted therewith in jeopardy, by the use of dangerous weapons, as will bring the offence within the following terms of the 19th section of the act of congress of the 30th April, 1810, entitled, 'An act regulating the post-office establishment,' to wit: or if in effecting such robbery of the mail the first time, the offender shall wound the person having the custody

thereof, or put his life in jeopardy by the use of dangerous weapons, such offender or offenders shall suffer death."

*Mr. Kell* then read the 19th section of the post office law.

*Act of April 30, 1810, Sec. 19.*—"That if any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned not exceeding ten years; and if convicted a second time of a like offence, he or they shall suffer death: or if in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death."

He then disclaimed all idea of influencing the determination of the jury, whether the acts proven bring the transaction within the meaning of the act of congress. And proceeded to inquire what is the putting life in jeopardy by the use of dangerous weapons?

1. The weapons used.
2. The manner of using them.
3. The alarm of the carrier.

It appears, said *Mr. Kell*, all necessary to constitute the offence is proven. The party met the driver in the night, on the highway, proclaim themselves highway robbers; that they are armed with double barrelled pistols and a dirk, that the pistols were cocked. It was then ascertained that they were armed with pistols, which were presented towards the driver and passenger; and soon after, that they had a dirk. The exhibition of such weapons, the purpose for which such exhibition was made, does create danger and risk of life; in other words, it does jeopardize life. It certainly was a putting the life of the driver, (as well as of *Mr. Ludlow*.) in jeopardy: did it not diminish their personal safety, and expose them to hazard?

It perhaps is not necessary that the driver should have apprehended his life to be in danger. If it were so, the language and requisites of the law are fully proven; he stood in the predicament of a man whose life was in danger, and under the fear and apprehension of danger, he parted with the mail.

The prayer presents the case in the fairest and most favourable manner for the accused.

The weapons used are such as are eminently calculated to endanger life, or put it in jeopardy; the pistols were cocked and presented, with the declaration, "if you resist, we will blow your brains out." This, 'tis true, the driver says he did not hear, but he heard and saw enough to produce fear, and therefore gave up the mail; can it be thought by any deliberate mind that such acts, for such a purpose, do not endanger life, or put it in jeopardy? Can it be said that the life of a man situated as was that of the carrier of the mail, at the time of this transaction, was not in danger? It is not necessary that the pistol be discharged; intimidation and danger, by such means, are sufficient to constitute the offence; the jeopardy of the life takes place at the moment when the weapons are presented.

With this view and consideration of the subject, *Mr. Kell* felt

BALTI-  
MORE,  
May, 1810.

United States  
v.  
Harr.

BALTI-  
MORE,  
May, 1818.

United States  
v.  
Hare.

himself authorized to ask the opinion and direction of the court, contained in the prayer submitted to them.

*Gen. H. M. Winder* hoped the court would not deem it irregular or improper for him, after what had occurred, to suggest his views to the court as *amicus curiæ* on the question now propounded by the counsel for the United States. Indeed, having been called upon by the prisoner, although at too late a period to be prepared to advise him preparatory to, or in the conduct of the trial, yet, he had deemed it his duty to listen attentively, and he thought, if any thing occurred to his mind of real importance to the prisoner, he was bound in duty, both to the court and the prisoner, to state it. He had never seen the clause of the act of congress until the trial commenced, and received from that perusal a very strong impression that the evidence did not support those counts in the indictment which charges the prisoner with a capital offence. This impression had been strengthened by the little reflection he had been able to bestow upon it, and more strongly confirmed by what he had heard on the part of the United States. The words of the act of congress are—"if in effecting such robbery, &c. &c. [See p. 311.]

Now, the life of the carrier must be put in actual *jeopardy* to bring the offence within that alternative of the clause; no *apprehension* of danger, or being put in *fear of his life*, satisfies the words of the act. The terms of the prayer to the court are a fair and just statement of the extent to which the testimony in this case can be urged, and by the very terms of the prayer no *jeopardy* of life is even supposed; it simply states, that *if the prisoner exhibited dangerous weapons calculated to take life, thereby putting the carrier in fear of his life, and thus obtaining, &c.,* can it be supposed, for a moment, that this is what is meant by congress when they say, put the life of the carrier in *jeopardy*? It would be to attribute to congress the most loose and unskilful use of terms; to make the *apprehension* of danger the *existence* of danger; the *fear* of *jeopardy* *actual jeopardy*. It is wholly impossible to contend that the words do not import an actual *jeopardy*; and if they do, surely the assumed state of proof in this prayer does not amount to actual *jeopardy*.

If the position contended for be true, it will follow, that a man may be guilty under this part of the act where no *jeopardy* of life has occurred; and if the prayer exhibits the just interpretation of the act of congress, a robber may put the life of the carrier in *actual jeopardy* without being guilty; for if he raises a *fear* of life, by having dangerous weapons, without doing any act which could possibly put life in *jeopardy*, he is guilty; but if a robber in the dark, without the carrier's knowledge, snaps a loaded pistol or gun within killing distance, with intent to kill the carrier, no body will doubt but here was *actual jeopardy*; but the carrier could not possibly have any fear of life, since he had no knowledge of it; and if the mail should be immediately stopped by the robber and his associates, without farther acts of intimidation, the party would not be guilty under this clause; can it be imagined that a construction leading to such absurdity can be just?

To support the construction contended for, it is necessary to con-

found *fear of life with jeopardy of life*. Now, since a man may be in *great fear of his life*, where there is not the least *jeopardy of life*, so there may be *great jeopardy of life*, without the least *fear of life*. To say that congress, therefore, meant *fear of life by jeopardy of life* is inadmissible, especially in a criminal statute. But farther, this *jeopardy of life* must, by the express terms of the act, be created by the *use of dangerous weapons*.

What is the *use of dangerous weapons* which can occasion *jeopardy of life*? certainly they must be so used, as that life may be destroyed; as if a man strike at another with a sword, or fire or snap a loaded pistol or gun at him within reaching distance; this is clearly a *use of the weapon that puts life in jeopardy*. But if a man had a sword by his side, or a pistol in his belt, and he stops the mail, and says to the carrier, you see I am armed, deliver the mail, the carrier might justly be said to deliver the mail in such case for *fear of life*; but can it be said, that in effecting this robbery the carrier's life was *put in jeopardy by the use of dangerous weapons*? It is impossible that it can.

Then if there be no ambiguity in the words of the statute, which it is respectfully believed there is not, how can any interpretation, especially in such case as this, be admitted different from these words?

The *use of dangerous weapons* to produce *fear of life*, may be very different from the *use of dangerous weapons* to put life in *jeopardy*; but nothing in this act can render a man guilty but such a *use of these as puts life in jeopardy*.

The facts in this case ought, therefore, to warrant the counsel for the United States to ask the court to direct the jury, that if they believe the prisoner had dangerous weapons, which he used so as to put the carrier's life in *jeopardy*, then he is guilty, otherwise the court cannot instruct the jury to find a verdict of guilty on this point.

General Winder concluded by remarking to the court, that this view of the subject appeared to his mind very strong, and he thought could not but have strong weight with every unprejudiced mind; and since upon so hasty a view of the question, such strong motives of doubt, to say the least, had occurred, he trusted the court would, in the forlorn case of the prisoner, being without counsel prepared to assist him, incline to the side of mildness; but at all events, if the learned attorney general should be able to incline the balance against the prisoner, he respectfully submitted, whether the question was not so doubtful as to require the court to put it in a situation to receive the deliberate judgment of the supreme court, before the life of the prisoner should be taken.

*E. L. Finley, Esq.*—He contended that congress, in using the words, "*jeopardy of life*," did not intend that the mere *presentation of a pistol or dirk at the mail driver, without wounding him*, should be such a "*jeopardy of life*," as would subject the party to the punishment of death; that the words, "*wound the driver, or put his life in jeopardy*," were used by them as *convertible and synonymous* words; that the words "*put his life in jeopardy*," were intended as *explanatory* of the words "*wounding the driver*," and defining and limiting their extent. Congress (said Mr. Finley) intended that

BALTIMORE,  
May, 1818.

United States  
v.  
Harc.

BALTI-  
MORE,  
May, 1818.

United States  
v.  
Harc.

the *wounding* should be such as would put the life of the driver in *jeopardy*. They may have supposed that some doubts might arise upon the construction of the words *wounding*, and as to the *nature and extent of the wounding*. They, therefore, inserted the words '*jeopardy of life*,' as explanatory, and to show that unless the wounding was of so serious a nature as to *jeopardise* life, the party should be subject only to imprisonment. The use of the disjunctive particle *or*, does not necessarily make them two distinct offences. Mildness and humanity are the distinguishing characteristics of our criminal code. The number of offences to which the punishment of death is annexed is very limited: and it is only where the offence is of a very aggravated and criminal character, that this humane consideration for the lives of the citizens has been departed from. The act of 1810 was intended as an *amelioration* of the former post office act. The act of 1794, section 17, annexed the penalty of *death* to a *simple* robbery of the mail, *unaccompanied with injury to the driver, or the use of dangerous weapons*. This severe punishment was considered as disproportioned to the offence. This act was repealed by that of 1810, which in the first clause of the 19th section, provides, that for a *simple* robbery of the mail, the party guilty shall be subject to 10 years imprisonment. Congress have determined, therefore, in this clause, by the *punishment* annexed, the *degree* of enormity they attached to a *simple robbery* of the mail. As then they did not consider it such an offence as to deserve death, they must be presumed to have intended, that unless the offence was *attended with very aggravating circumstances*, such as jeopardising the life of the driver by seriously wounding him, the punishment of death should not be superadded. This would be, in my opinion, an humane and reasonable construction of the act of congress. But if your honours should establish the construction contended for by the counsel of the United States, viz: that wounding and jeopardising are two distinct offences; this act loses all its character of mildness, and would deserve to be enrolled in the bloody code of Draco. You could not undertake to graduate the degree of wounding. But if in effecting the robbery of the mail, the party should wound the driver slightly or seriously—no matter whether in consequence of such wound his life should be jeopardised or not—it would be perfectly immaterial, and you would be obliged to inflict upon the party robbing the punishment of death. To show then, the absurdity of this construction, and its incompatibility with the object which congress must have had in view in making this provision of the act of 1810, viz: the amelioration of the act of 1794, punishing simple robbery with death.—Suppose that in effecting the robbery of the mail, the robber should make a slight and trifling puncture with his dirk in the flesh of the driver; should scratch the face or cut the skin of the driver, or some other slight wound, which could not, by any possibility of construction or inference, *jeopardise* his life. Would this be a circumstance of such aggravation, of such enormity, as to entirely change the character or degree of the offence of simple robbery, to enhance its criminality, and to give to it such an increased and outrageous degree of wickedness, as to require the proportionably severe punishment of death? Is it equal in criminali-

ty, and does it call for the same degree of punishment? Would this be an amelioration of the act of 1794? Heaven protect us from such an amelioration! But if the construction contended for by the counsel of the United States be correct, the slightest scratch or puncture given to the driver, or the mere presentation of a pistol or dirk, without wounding him, changes the mild character of the law, and subjects the party to death. Where was, then, the necessity of repealing the 17th section of the act of 1794, and substituting the 19th section of 1810? The act of 1794 makes no mention of dangerous weapons; it simply speaks of the robbery of the mail, and whether the robbery was effected by the use of weapons or not; the punishment was death. But is it to be presumed that a highway robbery of the mail would ever be attempted without dangerous weapons, such as pistols and dirks? If the mere presentation, then, of dangerous weapons, without wounding, attaches death to the offence, the first clause of 19th section of 1810, punishing a simple robbery, would be entirely nugatory and superfluous; as no robbery ever has, or ever would be committed without dangerous weapons. Can we suppose, then, that congress had no object in view in making this provision, and drawing a distinction between a simple robbery, and one accompanied with wounding?

Mr. Finley then observed, that he had always understood it to be an established principle, in all our courts of criminal judicature, and one from which courts or juries could not deviate, that the most favourable, the most refined, the most extended construction, should always be given, in "*favorem vitæ*," to all penal acts. That too much value and consideration were attached to the life of a fellow creature, to permit it to be "*jeopardised*," or taken away on account of indistinctness or ambiguity in the phraseology of a law. That when the provisions of a law appeared to be unusually harsh and severe, and repugnant to the general character and habits of the people, and a construction in "*favorem vitæ*," could be collected from the probable intention of the legislature that enacted it, that then such *intention* was to be the *rule* of construction. That the law of 1810, in the severity of its provisions, as contended for, was an anomaly in our criminal code; an isolated bloody statute, assimilating with nothing around it. That the most effectual mode of ascertaining the intention of congress, at the time of passing the law, and truly determining the construction they intended should be given to it, would be by examining the *operation* of the law, and comparing it with the *policy* which congress must have had in view in repealing the law of 1794, and substituting that of 1810.

Mr. Finley then took a view of the laws of England and France on the subject of robberies; of the respective *policy* of those laws, and their effect upon those two nations.

In France, said Mr. Finley, a robbery *unattended* with murder of the person robbed is punished by fine and imprisonment; if accompanied with murder, the punishment is an ignominious and painful death. In England, a simple robbery, whether accompanied by murder or not, is punished with death.

What has been the effect and operation of these several laws? In France, all temptation to *murder* the person robbed is taken away; the fear and the interest, if not the humanity, of the robber

BALTI-  
MORE,  
May, 1818.

United States  
v.  
Hare.

BALTI-  
MORE,  
May, 1818.

United States

v.  
Hare.

are enlisted and appealed to. The law says to him, if the robbery you commit is *unattended* by murder, if it is not *aggravated* by taking away the life of a fellow creature, we will reward you for your forbearance by respecting your own life. But if it is attended with the horrid and unnecessary crime of murder of your victim, the severest punishment which the law can inflict, viz: the deprivation of life, shall be the consequence of your cruelty. In England, no distinction of punishment is made between robbery with and without murder; and the highwayman, who probably impelled by the severest want, takes from you your purse, without endangering your life or even using any personal violence, and the hackneyed and hardened villain, who, to pamper and gratify his profligate passions, not only robs you of your purse, but deliberately and unnecessarily takes away your life, are alike involved in the same punishment, and punished in the same degree, notwithstanding the great disparity in the two crimes. All inducement to spare the life is therefore taken away for want of this discrimination. The highwayman, in the first instance, knows, that if he spares life, he leaves a witness to proclaim his crime, and to rise up in judgment against him when detected; that the law will not mitigate the severity of its punishment on account of his forbearance; but that if he murders his victim, he saves his own life, by silencing the only witness that could appear against him at a human tribunal. The consequence of this discriminating policy of the French law is, that scarcely an instance occurs of the perpetration of a robbery, accompanied with murder; whilst the lamentable result of the mistaken and barbarous policy of the English law is, that murder is almost inseparable from, and concomitant with, highway robbery; and the criminal annals of England furnish a bloody calendar from one year to another. May not congress then have had these several results of European policy in view at the time of passing this law? Would they not profit by experience? The object of their legislation was the public good, and the reformation of criminals. But it would be charging them with a most culpable disregard of the lives and safety of their fellow citizens, to suppose that they would be uninfluenced by the consideration of these several results. A reference, however, to the actual operation of the act of 1794, furnishes an additional and conclusive corroboration of the construction I contend for, and of the intention of congress to ameliorate the act of 1794 by that of 1810; for during the existence of the first act, several attempts at a robbery of the mail were made, and in almost every instance it was attended either with the murder of the driver, or the dangerously wounding of him.

In the instance of the robbery of the Richmond mail the driver was murdered.

Mr. Finley then observed, that the construction he had contended for, he conscientiously believed to be the true and correct one; but that, as he might be unsuccessful in his attempt to transfer this conviction from his own mind to the minds of the court, and as the counsel for the United States had contended for a different construction, he would make a brief reply to one of the arguments of the counsel, and then relieve the attention of the court. The counsel for the United States, said Mr. Finley, have contended, that the mere apprehension or opinion of the party, that his life was

in danger, was to be the criterion by which the jury was to determine whether his life was put in jeopardy, within the meaning of the act of congress. This, I conceive, to be a most absurd and fallacious criterion. It would require a scale in every instance by which to graduate the fears of the party robbed. Some persons are operated upon by fear more easily than others. Such is the constitutional timidity of some persons, as to magnify mole hills into mountains; and to people every bush with midnight assassins and robbers; should the driver be of this description, his life would be in continual jeopardy, according to this construction, while travelling on his route. The counsel have not properly discriminated between the mere fear or apprehension of danger, and the actual existence of danger—a man may anticipate danger, when no danger exists. I will give but one example in illustration of this distinction. Suppose a man presents a pistol which is not loaded; at the breast of another, (who is ignorant of its not being loaded) and in a threatening manner says, that he will blow his brains out. In this case, the party to whose breast the pistol is presented would most absurdly apprehend that his life was in great jeopardy, though the jeopardy would exist only in imagination.

Mr. Finley then laid down a distinction between the jeopardy of the driver's life, and the life of Mr. Ludlow. He contended that under this act, it was perfectly immaterial whether Mr. Ludlow's life was *jeopardised* or not. That the act only extended to the driver's life, and expressly confined and annexed the punishment of death, to cases of robbery, when the driver was wounded; or his life put in *jeopardy*. That this was an important distinction to be kept in view by the jury, in the examination of, and decision upon the testimony in this case. That there was a manifest difference in the testimony of Mr. Ludlow, and of the driver. That, although Mr. Ludlow swore that he considered his life in great danger, yet the driver swore that he felt no apprehension of danger to his life, until after the robbery was effected, and that his apprehension arose from an observation by one of the robbers, 'what shall we do with these men,' and the reply, 'I have a way to fix them;' but that his fears were removed, when he found, that 'the way to fix them,' was by tying them to the tail of the mail waggon. That he did not intend, by adverting to this difference in their testimony, to impeach the credit either of Mr. Ludlow, or the driver, but to show, that whatever may have been the apprehensions of Mr. Ludlow, or however his life may have been *jeopardised*, yet, that the driver's life was not *jeopardised*; neither did he feel any apprehensions of it.

William Wirt, Esq.—He hoped the opposite counsel would both excuse him, for observing, that they did not appear to him to have found the key which unlocked the construction of this law, in a manner the most simple and natural. They seemed to have taken it for granted, that congress intended to describe, by this section, a new kind of robbery, unknown to the common law, and which called for a different kind of proof. From this opinion, he begged leave to dissent. He contended, that congress had not intended to create a new offence, unknown to the common law, so far as the circumstances attending the act, and the degree of proof were con-

BALTIMORE,  
May, 1818.

United States  
Hall.

BALTI-  
MORE,  
May, 1818.

United States  
Hare.

cerned. That, although the mail was a species of property unknown to the common law, and congress, in making the mail a subject of robbery, had extended the offence to a new subject; yet that the character of the offence, *the robbery*, was the same, both at common law and under this statute; that the only effect of the act was to extend the offence to a new subject, leaving the character of the offence, and the degree of proof, exactly where the common law had left them, in regard to other subjects.

To make this clear, he begged the court to recollect, that wherever the constitution or laws of the United States used a common law phrase, without any definition of that phrase, it was the uniform course to resort to the common law for its explanation. It was unnecessary to cite to this court, to whom they were familiar, the decisions which illustrated and proved this course; it was, indeed, impossible to conceive that any other could be adopted. But the court would observe that this principle was essential to the construction of this law, and that it demonstrated the truth that a new kind of robbery was not intended to be created. For in the first part of this section, the term *robbery* is used without any definition. The words are:

*Act of April 30, 1810, sec. 19.*—"That if any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned not exceeding ten years; and if convicted a second time of a like offence, he or they shall suffer death; or if in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender or offenders shall suffer death."

Thus far the provision is general, by the use of the term *robbery*, which is left unexplained; a resort must, therefore, be had to the common law, from which it is borrowed, to explain it; and every species of robbery known to the common law is clearly embraced by the clause just quoted. If the court will attend to the structure of the sentences, which follow this first sentence, and which are supposed to create a new offence they are merely exceptions from the first sentence, and were consequently included in it, until so excepted: if the first sentence therefore covers, and merely covers the common law offence of robbery, and the latter are only exceptions from it, these exceptions are merely parts of the common law offence of robbery, and consequently no new offence, and calling for no new and more aggravated degree of proof. Again, if you recal the different species of robbery as they have been decided to exist at the common law, you will perceive that the sentence, on which the two first counts of the indictment are founded, describes a kind of robbery perfectly familiar to the common law.

At the common law, robbery might be committed, 1st by *violence*, without putting life in danger, and without previous fear; the lady whose ring was snatched from her in some place of public amusement, and dropped among the curls of her hair, was decided to have been robbed, although there was no danger of life, and no previous fear operating on her will, to cause a surrender of the property.

2. By fear for reputation; as by a threat to charge the party with an infamous crime unless he should surrender his purse; in this case, there is no violence offered to the person and no danger to the life, yet the robbery is complete—it is the lawless constraint acting on his will, from regard to his character, which induces the surrender of his property, and which constitutes the offence. 3. By fear of personal violence; but this must not be the groundless fear of cowardice; the law requires that the danger should be apparent, and hence circumstances are always required to show that the fear was well founded; this was the kind of robbery in the contemplation of congress in the sentence under consideration.

They have stated the evidence which shall show that the danger was real, the fear well grounded; wounding the driver, or (without wounding him) *putting his life in jeopardy, by the use of dangerous weapons*. The robber, who, with a pistol, stops a traveller on the highway, and demands his purse (a case familiar to the common law courts of criminal jurisdiction in England,) presents the very case put by the act of congress. The weapon used is a pistol; a weapon fabricated for the very purpose of danger to life; it is used because it is dangerous; and the use produces the effect intended, by acting on the fears of the traveller, and inducing him to surrender his purse, by reason of the jeopardy to his life. There is nothing in the descriptive circumstances of the offence under the act of congress, to distinguish that offence from the high-way robberies once so common on Hounslow Heath and Bagshot in England.

But it is insisted on the other side, said *Mr. Wirt*, that something more is meant by the expression *putting the life of the driver in jeopardy by the use of dangerous weapons*; it is not enough that the robber be in possession of the dangerous weapons; it is not enough that he carry them to the ground; it is not enough that he perpetrates the robbery by the terror which they inspire; but they must be used in such a way as to produce jeopardy; for example, if the weapon be a dirk, a stroke must be made with it; if it be a pistol it must at least be snapped. Let us examine some of the consequences of this construction. If a stroke be made with a dirk at right angles from the driver, it is not easy to conceive that greater jeopardy is produced thereby, than by the mere possession and display of the weapon in the robber's hand; such a stroke would be nothing more than a flourish, *in terrorem*; if the stroke be at an angle of forty-five or twenty-two and a half degrees, the same answer might be given to it; and so through all the gradations of angular distance; if the stroke miss the object, and be not repeated, the jeopardy is over, a miss we are told being as good as a mile, or if gentlemen think this answer too light, is it not obvious that by insisting that the stroke shall, at all events, be made, in order to constitute the jeopardy, they force the court and jury upon a mathematical disquisition as to the distance and the direction of the stroke, in order to jeopard the life? points extremely difficult of ascertainment, considering that their attempts are generally if not always made in the night time, when the distance and the direction, and even the fact of a stroke being made at all, can rarely be discerned. As to the snapping of the pistol, all the remarks made upon the direction of a stroke with a dirk apply, and indeed it is not very

BALTIMORE,  
May, 1818.

United States  
v.  
Hare.

BALTI-  
MORE,  
May, 1818.

United States

v.

Hare.

easy to discern, even if the pistol be levelled at the driver's head, how its having been snapped increases his jeopardy after the snap is over; besides, the chances are sadly against the calculation, that a pistol prepared for a robbery will snap; the probability is that it will go off; and then there is no jeopardy, for jeopardy implies uncertain danger, whereas, on this supposition, the hazard is reduced to a doleful certainty; the driver is killed. Can it be believed that this was the intention of congress? Can it be believed that any thing more was meant than that the robbery should be effected by the use of dangerous weapons, of weapons calculated to take life?

But still bolder ground is assumed on the other side; it is contended that in this case there was no jeopardy to life, because the robbers gave the assurance that if the driver and passenger would not resist they should not be hurt; it may be very true, gentlemen say, that if they had resisted they would have been killed; but they had only to give up the mail without resistance and there was no jeopardy at all;—and hence the case is not within the act of congress. This is the construction given to an act of congress intended to prevent robberies! Sir, it must be very clear that the jeopardy within the contemplation of congress was that kind of jeopardy which was in no other way to be avoided, than by yielding to the lawless purposes of the robber; a jeopardy of life so imminent, that the driver could not elude it, except by surrendering that which the robber had no right to demand. This ground so intrepidly taken in the construction of our statute would be just as tenable under the English common law; for example, by that law it is required that the party shall be put in fear; but the courts there require that this fear shall have a reasonable foundation; the robber there might say, it is true I was armed, it is true the traveller was put in fear; but the case is not within the law, because his fear had not a reasonable foundation, for he admits, I told him I would not hurt him if he would surrender his purse. Such an agreement, I must be permitted to say, would make but sorry figure in Westminster Hall, or even at the old Bailey; for it goes to patronize and protect, not to prevent or punish robberies; it founds the robber's exemption from punishment on the very circumstance which constitutes his guilt—the success of the robbery.

The gentleman who urged his argument attempted to support it by a case from the law touching assaults and batteries, which he seemed to think analogous; that case is this: if a man were to lay his hand upon his sword, and say if it were not assize time he would not take such language; this the gentleman says, and says truly, would not be an assault, but why? for a reason which destroys the analogy; because the words show an absolute purpose to do him no mischief at that time; the forbearance is not put on the condition of any act to be done by the party menaced; but suppose the assailant had drawn his sword, and required the other to fall upon his knees instantaneously and beg his pardon, or he would run him through the body, when the gentleman shall show by authority that this would not be an assault, he will have furnished a case which does not present something like the appearance of analogy."

The respectable young gentleman, (*Mr. Finley*.) who last addressed the court, has insisted that the words "wounding the driver or putting his life in jeopardy by the use of dangerous weapons," mean the same thing; that the driver is, at all events to be wounded, and so wounded as to put his life in jeopardy; to this I think it sufficient to answer, that the conjunction used is the disjunctive *or*, and that according to all the rules of fair construction there were two cases in the contemplation of congress, the one wounding the driver, the other putting his life in jeopardy, by the use of dangerous weapons without wounding him. The aid which the gentleman attempts to derive to this construction from the act of 1799 is not in my opinion fairly furnished; the expression in that law is, "shall *much* wound the person having custody thereof, or put his life in jeopardy by the use of dangerous weapons;" these were clearly distinct offences; in the present law, the word *much* is dropped, obviously because it was indefinite, and might lead to difficulties in the decision of cases arising under it, and because any wounding of the driver would be sufficient to show the wicked and determined purpose of the robber; but that purpose would be shewn with equal clearness without wounding the driver, in effecting the robbery by the use of dangerous weapons calculated to take the driver's life.

If any doubt could remain on this subject, it would be removed by pursuing this section of the law a little farther. It appears, that robbing the mail, generally, is punished by the first clause of the section, only with imprisonment for the first offence; yet there were some modes of perpetrating such robbery so peculiarly obnoxious, that congress had singled them out by express exception, and punished the first offence committed in either of these modes with death:—congress have gone still farther, and punished even the unsuccessful attempt to commit the robbery, in either of these modes, with imprisonment for three years, and words in the section, in which the attempt is described, are intended to represent the same mode in which the act is described. So far as we have yet gone, the purpose is to punish the offence, if effected; congress next take up the attempt to commit the offence, where it fails. In defining the different modes of such attempts, they have kept up the analogy between the successful and unsuccessful attempts, and by a slight variation of language have thrown new light on the clause we are considering. The language of the law, where the offence is complete, is as follows: "If any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned not exceeding ten years; and if convicted a second time of a like offence: he or they shall suffer death; or if in effecting such robbery of the mail, the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender or offenders shall suffer death." I beg the court now to mark the correspondent description of the attempts. The words are these, "and if any person shall attempt to rob the mail of the United States by assaulting the person having custody thereof, shooting at him, or his horse or mule, or threatening him with dangerous weapons, and the robbery is not effected," &c.—Here it is clearly observable

BALTIMORE,  
May, 1818.

United States  
v.  
Hara.

BALTI-  
MORE,  
May, 1818.

United States  
v.  
Hare.

that the *assault*, generally, meets the general description of the robbery, in the first sentence; 2ndly, that the shooting, in the attempt, corresponds with the wounding in the robbery; and thirdly, that the threatening the driver with dangerous weapons, in the unsuccessful attempt, corresponds with the putting his life in jeopardy, by the use of dangerous weapons; thus the description of the attempt, reflects light on the description of the act, and demonstrates that congress, by using the terms "putting his life in jeopardy by use of dangerous weapons," meant nothing more than "threatening him with dangerous weapons," without having in view any other use of the weapons, or any further degree of jeopardy. According to the opposite construction, it would appear that congress had been solicitous to punish this peculiar mode of attempting the robbery with a peculiar punishment, distinguishing this kind of attempt from any other attempt; while the actual perpetrating the robbery by the use of dangerous weapons was left unpunished by any peculiar degree of rigor, thus convicting congress of an absurd solicitude about the attempt, without any correspondent solicitude in relation to the act: and to produce this absurd consequence, you are required to adopt principles of construction so subtle and metaphysical, as to what will or will not constitute jeopardy, that there are perhaps no twelve men in the community who will agree in their application to the same case; if you take the plain case which it seems to me was clearly before congress, that of robbing the mail-upon the highway by the use of weapons dangerous to life, every case which can arise is carved, and the act is in perfect harmony with itself. By any other construction, the act is rendered imperfect, unjust, and absurd.

The same gentleman has animadverted on the impolicy of punishing with death a robbery which has not been attended with the death of the party robbed, and he has enlarged on the different effects of the English and French law, in this particular. In the remarks which the gentleman made on this subject, he has presented a pleasing proof of his habits of accurate and extensive investigation. In this case, however, it was misplaced; for it is an investigation of a legislative, not of a judicial character; whether the robbery charged in the indictment ought, or ought not in good policy, to be punished with death, is obviously a question for congress, not for this court; for those who make laws, not for those who expound them.

The same gentleman has commented on the particular facts of this case, in his address to the court. This, also, was out of place. The court have nothing to do with the facts; these belong to the jury; we have not called for the court's opinion on the facts; we have prayed merely for their construction of the law; should they give it, as we have prayed, it will remain for the jury to say, whether the evidence brings the case within that construction. Since, however the jury had, in effect, been addressed through the court, in relation to the facts, he would barely remark, that, according to the evidence of the driver, the mail stage had been stopped, about midnight, by a fence purposely erected across the highway, that immediately on its stopping, three men rushed from the fence to the stage, declared themselves highway robbers; that they were well

armed with pistols and dirks, and had come to rob the mail; that the driver gave up the mail, through fear of his life, and that he saw the weapons in the hands of the robbers: this, we contend, brings the case within the construction of the act, for which we contend: the identification of the prisoner at the bar, as one of the three robbers, has not been disputed.

The gentleman made another remark to the court, intended, he presumed, to awaken the sympathies of the jury. The gentleman alluded to the peculiar manner in which this prosecution had been carried on, and represented these men as having been pursued *with fire and fury*. The remark had not been deserved by any thing that had appeared in the prosecution since he (Mr. Wirt) had come into it. The prosecution had on the contrary, been conducted with the utmost coolness and moderation: and he was well assured that its previous stages had been marked rather by excessive lenity and indulgence, than by a spirit of persecution.

*Mr. Finley.*—I am sorry to be obliged to interrupt the learned gentleman; but he has entirely misapprehended the nature and extent of my observations. I did *not* make any reflections upon him, for the manner in which the prosecution had been conducted. Such reflections would have been unjust and unfounded, as the learned gentlemen only this morning came into the case. I spoke of the general character of the prosecution, and of the powerful excitement of public feeling which threatened to overwhelm not only the prisoner at the bar, but the counsel who defended him; and which has manifested itself in a manner so general and so violent, as almost to preclude the possibility of a fair and impartial trial.

Mr. Wirt admitted that he had mistaken the gentleman. The popular indignation, however, of which the gentleman complained so vehemently, was certainly very natural, and he would add very honourable. It was the indignation of a virtuous people against a most flagitious and daring offence. He hoped never to see the day when the recital of such a crime would be heard with composure by the American people. It would be a mournful proof that our moral sensibility was gone. At the same time he should regret extremely that the indignation of the jury against the offence should mingle itself with their examination of the evidence against the person here accused: for it did not by any means follow, that because the offence was enormous the prisoner at the bar was the person guilty of it. He was to be tried by the judgment, not by the passions of the jury; he was to be tried by the evidence, and not by their feelings either of indignation or of mercy: for mercy was not, as the gentleman had alleged, the prerogative of the jury; mercy towards criminals was the prerogative of the president of the United States; to him, under our constitution, and to him alone, belongs the power of reprieve and pardon. The jury had sworn to try the cause according to the evidence; to whatever conclusion, therefore, the evidence conducted them, that conclusion was to be their verdict; they had no alternative—they could make no compromise with their consciences; they had only to discharge, with inflexible firmness, that duty which the laws of their country had confided to them, and when the question of mercy came before the president, there could be no doubt that he would discharge his

BALTI-  
MORE,  
May, 1818.

United States  
v.  
Hare.

BALTI-  
MORE,  
May, 1818.  
~~~~~  
United States
v.
Hare.

with equal fidelity. When that question shall come before him, if ever it shall come, he will remember that mercy, however amiable in itself, degenerates into weakness, and even into guilt, where it is improperly directed. He will remember that there is a mercy due to society as well as to individuals, that the proper object of mercy is, either suffering virtue or penitent guilt; penitent guilt, which presents a well-founded hope of reformation; he will remember that a penitentiary is not always a place of repentance; that there have been persons who have been once, twice, thrice, and four times sentenced to that species of confinement, to whom it has proved no school of reform, who have applied the hours of their solitude to no other purpose than to sharpen their wits in projecting new schemes of rapine, and who have come forth into society only the more hardened in guilt, and the better prepared to carry on their depredations on a broader, bolder, and more daring scale. There are such men, (we do not say the prisoner is one,) there are men, we all know, so perfectly dead to every touch of virtuous feeling, so obdurate and stubborn in guilt, and so perversely proud of the success of their crimes, as to set at nought all obligations human and divine, and to laugh not only at the whip of the law, but even at the thunder of heaven. What mercy would there be to the virtuous part of society, in letting loose upon them men (if such monsters can deserve the name of men) of this description? These remarks, he said, were drawn from him against his purpose, by the unexpected course pursued by the gentleman to whom he was replying. Adverting again to the instruction prayed for, he said the question before the court was simply one of law; that the counsel for the prosecution had embodied their construction of the act in the prayer which they had addressed to the court; that they sought only to relieve the jury from the perplexity of a legal inquiry, to which they could not be supposed to be so competent as the court, and that they should be perfectly satisfied with any instruction as to the law, which the court should think proper to give the jury. The court would observe, that there were three counts in the indictment; the two first of which embraced the construction given to the act, by the counsel for the prosecution; the third count was founded on that construction, which was advocated on the other side, so as to leave the jury at liberty, under the instruction of the court, to find the prisoner guilty under either or all the counts, or not guilty at all, according to their view of the evidence; and as I do not propose to address them, I will only add, that whatever verdict they can reconcile to their consciences, will be satisfactory to us, content, as we shall be, with having done our duty.

After Mr. Wirt had closed his observations, the court charged the jury upon the law, and gave their opinion in support of the prayer submitted to them by Mr. Kell; the jury retired to their chamber, where they remained near two hours, when they desired some legal advice from the court, for which purpose they returned to their box; they observed, that the indictment set forth that the prisoner had pistols and dirks, and it was not in evidence that he had a dirk. The court stated their opinion to be, that if the party were armed with pistols and dirks, it was immaterial whether they were in the hands of the prisoner.

One of the jury then asked Mr. Ludlow if any threats were used. He answered there were in case any resistance should be offered.

The jury then, without again leaving the box, delivered their verdict *GUILTY on all the counts in the indictment.**

BALTI-
MORE,
May, 1818.

United States
v.
Hare.

*On the trial of John Alexander and Lewis Hare, the two other mail robbers, who were charged with robbing the mail in company with John Thompson Hare, and were immediately tried and convicted on all the counts of a similar indictment, the same defence was made, and the court laid down the law as in the preceding case. See their trials, post.

CIRCUIT COURT, U. S.

PHILADELPHIA, JUNE, 1818.

<i>United States</i>	}	INDICTMENT FOR HAVING AIDED
vs.		AND ABETTED IN THE ROBBERY
<i>William Wood.</i>		OF THE MAIL, &c.

Present—Hon. *Bushrod Washington.*
Hon. *Richard Peters.*

C. J. Ingersoll, District Attorney, Counsel for the
United States.

Z. Phillips, Counsel for the Prisoner.

Mr. *Ingersoll* opened the cause to the jury, by detailing the facts that would be given in evidence, and con- The conviction of a person for a crime in the circuit court of the United States, is the most conclusive evidence against an accessory, in another circuit, that such a crime was committed.

Putting the mail carrier in fear, and his life in peril or danger, is putting life in jeopardy within the meaning of the act of congress. The jurisdiction of the circuit court of the United States, in criminal cases, is confined to offences committed within the district for which those courts respectively sit, where they are committed on land.

Judgment arrested, because the caption of the indictment stated, "at a circuit court of the United States of America, in and for the Pennsylvania district:" it appearing the state of Pennsylvania had been divided, by an act of congress, passed subsequently to the presentment of the grand jury, but previously to the trial, into two districts, one called the eastern district of Pennsylvania, and the other the western district of Pennsylvania.

PHILAD'A,
June 1818.

United States

v.
Wood.

The attestation of the presiding judge is not necessary to the certificate of a record made by the clerk of a district court of the United States, that it is his certificate, or that the seal is that of the court, or that the record is in legal form: it is sufficient if the seal of the court is affixed to the record.

cluded by reading the law on which the indictment was founded. It is contained in the 19th and 21st sections of the act "regulating the post office establishment," passed April 20, 1810:—"that if any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned not exceeding ten years; and if convicted a second time of a like offence, he or they shall suffer death; or if, in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death."—Sec. 19.

"That every person who shall procure, aid, advise, or assist in the doing or perpetrating any of the acts or crimes by this act forbidden to be done or performed, shall be subject to the same penalties and punishments as the persons are subject to who shall actually do or perpetrate any of the said acts or crimes, according to the provision of this act."—Sec. 21.

Mr. *Ingersoll* then offered the record of the conviction of John T. Hare and others, who were the principals in the mail robbery, and who were convicted at Baltimore.

Mr. *Phillips* objected to this conviction being received by the court, because there is no attestation of the presiding judge that the certificate attached to the record is that of the clerk; or that the seal is that of the court; or that the record is in a legal form. Also, that the record is on three distinct sheets of paper, not attached or connected together.

Mr. *Ingersoll*.—If this were a state court, and this re-

cord certified from one county to another, as it is, would it be in form? That is the question, for the districts of the United States are part of the same country, and not foreign to each other. To require the certificate of the presiding judge would end in nothing; for then you must go farther, and get a certificate, if such a thing could be had, that he is a judge of the circuit court, which would be a difficult thing, as the judges of the supreme court are not commissioned circuit judges. Besides, the circuit judge does not appoint the clerk, and probably never sees his commission. All he knows is the acting of the clerk *ex officio*, and possessing and using the seal of the court.

PHILAD'A.
June, 1818.

United States
v.
Wood.

As to the second objection, Mr. Ingersoll observed, that the record is written in the same hand, and is connected in the matter from sheet to sheet, and there is nothing in it that can for a moment make the court doubt that it is not the entire record. It is for the court to say, from an examination of it, whether they believe it to be one record.

Mr. Phillips.—This record is signed by P. Moore, and it is impossible for this court to know, judicially, that P. Moore is clerk of the court whence the record issued; he gives the only evidence that he is a clerk which the court will not allow. The danger of accepting a record of this kind would be very great, and might lead to very serious frauds, for it would be an easy matter for a man to sign himself clerk, and step into the clerk's office when he was absent, and attach the seal to a certificate that he was clerk. In executing commissions in *civil cases*, the greatest strictness is observed and required; and where the record consists of more than one piece of paper, every sheet is marked and numbered, and attached together. The same strictness should be ob-

PHILAD'A. served in *criminal cases*, particularly where the life of
June, 1818. the man is the forfeit in case of conviction.

United States v. Wood. Mr. Phillips also objected, that it was not certified to be a full exemplification of the record.

The Court overruled the objections. As to the first objection, there is no law which requires such a certificate. The act of congress of the 26th May, 1790, (1 vol. 115.) does not apply to the records of the federal courts; and even as to the records of the state courts, that act does not require a certificate of the judge that the person attesting the record is clerk. It is sufficient in this case that the seal of the court is affixed. Were it the record of a state court, the certificate of the presiding judge that it was done in due form would be necessary.

As to the other objection, it is by no means fatal to the evidence, although it is certainly improper to certify records in the way that this is, in sheets unconnected by some fastening. But if the court, upon inspection, is satisfied (as we are in this case) with the verity of this record, that is sufficient.

Mr. *Ingersoll* then read the conviction of John Alexander and others, indicted for robbing the mail, from the record of the circuit court in Baltimore. He then called the following witnesses.

EVIDENCE.

Owen Churchman, affirmed.—In consequence of information left at my counting house by Mr. Baily, I was going to see him; on my way I met Wood, the prisoner and another (by the name of Davis) conversing together, I followed them down to Water-street, Davis went into a sloop-shop; I spoke to an acquaintance to watch Wood, and went into the shop to watch Davis; he showed no money; I went out and waited. I had not been out many minutes, when a boy came out of the sloop-shop with a note, and went into Mr. Pritchett's store. (The note was payable to the order of Churchman and Thomas.) Wood also went into Pritchett's store, I followed him and the boy in; Wood asked the price of flour; I caught him and sent word to have Davis secured. We took them to Mr.

Baily's office, and thence to Alderman Bartram's. When I first saw Davis and Wood, supposing them to be the men described by Mr. Baily. I followed them and saw a paper pass from Wood to Davis. When at the alderman's, Wood refused to give any account of the manner by which he became possessed of the money; he said he was an honest man. The alderman told him if he was honest, he would not refuse to give an account of the money. Wood replied, "If this answer will do, I found it [the note] near the market-house in Callowhill-street." I assisted in stripping him, and found a pistol in a belt under his waistcoat. He acknowledged giving the note to Davis.

PHILAD'A.
June, 1818.

United States
v.
Wood.

A statement had been made by Mr. Ducker, (a broker) of the manner in which the note had been presented to him; he said that Wood had been two or three times at his office, and had sold him parcels of North Carolina money; that the last time he was there, he presented this note, (the one he had endeavoured to pass charged in the indictment) that he, Ducker, discovered that it was payable to Churchman and Thomas, and wanted their names to make it negotiable, and asked him whether he was one of the firm; he replied that his name was Churchman, and that he was from Baltimore; that Ducker then said, if he was one of the firm, and would endorse the note, he would purchase it; that Wood seemed confused, and walked out. Wood said in the alderman's office, that all which Mr. Ducker had stated was correct, and acknowledged being in prison before in Philadelphia and Baltimore.

Cross-examined.—There were a number of persons in the office, about twelve or fifteen. I do not recollect any particular conversation about the robbery of the mail; if Wood was charged with robbing the mail I do not recollect it; it must have been when I was not near enough to hear. I stated that this note must have come from the mail, but I do not recollect any particular charge, that Wood had robbed the mail. He said he was in the city when the mail was robbed, and he brought a witness who swore that he had lodged with him on the night of the mail robbery, he then called himself Alexander.

Chester Baily sworn.—I first saw the fellow to the pistol at Havre-de-Grace. I went there on the 13th March, after hearing the mail was robbed. After the information I received from Mr. Ducker, I got a written description of Wood from him, and sent it throughout the city. Churchman came in a short time after, with Wood and Davis; I immediately saw that Wood was the man I had given a description of. We went with the prisoner to alderman Bartram's office; the first thing done was to search Wood, and the pistol was found on him; I observed to the alderman that this was the match to the pistol found at Havre-de-Grace. I sent for the pistol; it was forwarded by mail. Wood was asked some questions about the note; he said the note belonged to him, and not to Davis. I asked him where he got it, and if he got it honestly he would tell; he said he got his money as honestly as I got mine, and afterwards he said he found it in the street.

David Bell sworn.—I saw this note enclosed in a letter at Charleston, S. C. and put it in the post office; it was directed to

PHILAD'A. Churchman and Thomas. The endorsement is my father's. There were forty \$100 notes enclosed in the letter.

June, 1818. *John Ducker* sworn.—About 9 o'clock of the morning that Wood was apprehended, he sold me a \$100 note on the State Bank of N. Carolina. At the middle of the day he offered me some other notes, about \$57, for which I did not offer enough; I wanted 40 per cent. discount. He said he must consult his brother; he stepped out and then came in and agreed to sell me the notes; they were Somerset notes, of Maryland; I bought them; he then offered me this note; I asked him if he was one of the firm, he said his name was Churchman, of Baltimore. I gave this statement before the alderman; Wood said it was correct, and the alderman entered his acknowledgment on the docket.

United States
v.
Wood.

Furman Black affirmed.—I am one of the keepers of the prison. Some day last week a gentleman called at the prison and wanted to see Wood; I went to the cells with the gentleman to see him; the gentleman addressed him by the name of Wood or Alexander, and asked him if he would do him the justice to give him an order for some money that was in the hands of Bartram. Wood observed that he had nothing to do with the robbery of the mail, that the money he got exchanged he received from John Alexander, and returned the proceeds to him; he then stated the money was found with Alexander behind the looking glass, and it was the identical money which was the proceeds of the notes he exchanged for Alexander.

Mr. Ingersoll here read the following order for this money, which was signed by the prisoner:

I hereby authorize Mr. J. A. Isaacs to receive of George Bartram, Esq. the sum of three hundred and thirty nine dollars, fifty cents, which was found in my possession, and taken by the officer who executed the process under which I was arrested, and which were the proceeds of Mr. John M. Patton's check on the Philadelphia Bank, or if the said money should not now be under the control of the said George Bartram, Esq. I authorize any person who may have the control of it, to pay the same to the said Isaacs.

(Signed.)

WILLIAM WOOD.

May 27th, 1818.

Witness present, Seth Price.

Thomas Hare sworn.—About the 27th of February last Wood and myself started from Baltimore; we arrived here the 3d or 4th of March; when we came here I understood that Joseph and Lewis Hare were in the city; I found them—Joseph, at John Alexander's and Lewis, at a house near there. Lewis came down to John Alexander's, and they told me about this plot of robbing the mail, which was to be executed as soon as Joseph's feet got well, which were sore by travelling. I do not recollect whether Wood was there at that time or not. They asked me if I knew who had pistols; I told them Wood had; I asked Wood to let them have his pistols; he refused at first, and then consented to lend them. These look like the pistols; they were brass barrels; I never had them in my hands but once or twice; I think they received the pistols the day before they started. Sunday morning previous to the robbery John Alexander, Lewis Hare, Joseph T. Hare, W. Wood, and

myself, started from Alexander's house; we went into Arch street, and went up Arch-street, as far as 10th or 11th street, when Wood and myself returned, the others went on to rob the mail, as they said; I returned to Alexander's house, and Wood went down town. On the Friday following, John Alexander returned, and said he had completed the business, and had received about 4,000 dollars. The next day Wood came to Alexander's; the conversation again took place about the mail robbery; Alexander told Wood that he had got about 4,000 dollars from the mail, as his share; and gave Wood a post note of 100 dollars; he said he did not know much about the note, but he would give it to him, that he expected it was good. I do not know whether this is the note; I gave him a 100 dollars note also. Alexander gave him the note as a present, or as a compensation for the loan of the pistols. Wood was present when the pistols were cleaned; I took one to pieces to clean it.

Cross examined.—I believe the plan to rob the mail was made before Wood and I came from Baltimore. I knew nothing of it until I came from there. John Alexander or Joseph Hare first told me of it. I think it was Joseph, they all talked to me about it. I think I mentioned to Wood first, that they were going to rob the mail, but am not certain. Wood did not advise against it. I was not to go with them; Lewis wanted me to go, but Joseph did not want me. The three that went were to divide the spoil. I was to receive none. I did not state in my examination that I was taken sick, and returned on that account. I stated that I was unwell when it took place. Mrs. Alexander was opposed to the plan. I received two notes from Alexander, one of 100 dollars, and one of 10 dollars. I gave one of 100 dollars to Johnson, and one of 100 dollars to Wood. Joseph and Lewis Hare are my brothers. Joseph is the oldest—Lewis is younger than I am. I saw Wood whilst the three were absent; he lodged in the same house with me for two or three nights. I do not know what part Wood took but lending his pistols. He was not invited to go; they thought three were enough. Lewis said he would rather have me than Alexander, as he was afraid Alexander would tell of them, and he did not know Alexander. I made the disclosure to Mr. Bache; my motives were, Mr. Bache said he would favour me all he could. What induced me was for the sake of liberating my brothers. I supposed if I was not admitted as a witness, John Alexander would be, and we all three should be convicted, as John Alexander was present. I had not been acquainted a long time before with Wood. I formed an acquaintance with him at Baltimore. I heard of the mail robbery before Alexander came up. It was understood that the mail was to be robbed when Wood lent the pistols. I informed him when I asked him for them.

T. W. Ludlow sworn.—Gave the same evidence as on the trial of the three principals convicted at Baltimore.

D. Boyer, the mail carrier, was also sworn, and testified as in the former trial.

John M. Patton affirmed.—On the morning of the day he was taken prisoner, Wood offered me 350 dollars on the state bank of N. C. I exchanged the notes for him, and paid him in a check on Philadelphia Bank; after I paid him he left the office. I sold the

PHILAD'A,
June 1818.

United States
v.
Wood.

PHILAD'A.
June, 1818.

United States
v.
Wood.

notes to H. M. Prevost. When I found the notes were taken from the mail I went to Mr. P. to take a minute of the marks and numbers of the notes, which he did also.

Richard Bache sworn.—I accompanied Wood to prison, to have him searched; he protested that he had nothing to do with the robbery of the mail, and refused to tell me at that time where he got the 100 dollar note that he had given Davis to pass. He told me that he lived at Deal's tavern, up sixth-street, and afterwards that he resided at Mr. Black's. I went to him the morning after he was committed to prison, and told him the object was not so much to punish the offenders, as to obtain the money robbed from the mail, and I urged him to tell me where it could be found; he denied knowing any thing about it, and told me I might as well rob the mail as to take the money which he said he became possessed of lawfully. At the magistrate's he said that he worked on the turn-pike, and received the note in payment for work done on the road. After Hare and Alexander had made a confession, I was of opinion, that a fourth person had been engaged on the spot in the robbery, as the four horses had been taken from the mail waggon, and as the sum which Alexander acknowledged to have been his portion, was so much smaller than that found on the persons detected at Baltimore. I went to the prison, therefore, and had Alexander, Wood and Thomas Hare brought out of their cells into the entry. Alexander there stated, that Wood knew of the robbery, and that when he came from Baltimore, he gave him the money which he had taken from the mail to exchange; that he went along with him to the broker's office in fourth-street, (Mr. Ducker's) that he stood at a distance and gave Wood the money, which when exchanged, Wood returned the proceeds to him. Alexander said, that he had given the 100 dollar note to Wood for himself; Wood did not deny any thing that Alexander said, but when Alexander assured me that there were but three persons actually engaged on the spot in the robbery, Wood observed that we had Alexander's confession that there were but three concerned, and he hoped we did not want to hang more than the three. I told him to be on his guard; and that persons concerned in aiding and abetting would share the same punishment as the principals. At a previous time, when I pressed him to tell me where the money was, and that it would be a serious matter to him if he did not disclose the facts, he said that he was not afraid, that no person concerned in the robbery could be admitted as a witness against him, because they had all been convicted; that Davis, who informed against him, was a convict, and that Alexander and Thomas Hare were both convicts; to which I replied, that Hare had been pardoned. Wood remarked to me, that Alexander had told me he had given up all the money, and he asked me why I suspected him. Alexander told me that he had placed the money, (the proceeds of that which Wood exchanged) behind the looking glass. He did not state that Wood was to have a share in the plunder, but he said that the reason why Wood and T. Hare did not accompany them was, that they concluded three were enough; and if there were more, there would be greater difficulty in escaping detection.

The prisoner offered no evidence.

Mr. Ingersoll, the District Attorney, contended, that the evidence in relation to all the counts which are not capital, was conclusive; whether the other counts were proved would depend upon the meaning which the court and jury might give to the word *jeopardy*, in the 19th section of the law. With respect to the term *jeopardy*, he observed that the legislature used a word for which we can recur to no code of laws for a definition. We are obliged to inquire of dictionaries for its meaning. This is the first step of departure from that precision which the law exacts in a criminal case. Dr. Johnson derives it from the French *J'ai perdu*—*I have lost*—and defines it *peril, danger*; I should rather derive it from *Je perde*—*I lose*—and define it extreme peril or danger, equivalent to, *it's all over, I am lost*, or the like. When a loaded pistol is presented with a threat to discharge it, the man aimed at may be in *fear*, as the driver of the mail says he was; and he may be in *danger* too, but not that *extremity* of danger which this word calls for. If the pistol had been fired, and missed or snapped, I should consider the life in jeopardy by the use of the dangerous weapon; but I doubt whether a mere menace to use a loaded pistol or naked dirk, can be considered as within the law; and it would be especially severe to apply the strongest meaning of a *doubtful* word, in an accessorial case like this, where the accused was not at the place of perpetration.

In short, my difficulty is this: the word is doubtful, and the case is capital. Like the word *revolt*, therefore, on which this court had refused to settle a judgment of conviction in a capital case, it appears to me that the prosecution is liable to be defeated by the mere doubt-

PHILAD'A.
June, 1818.

United States

v.
Wood.

PHILAD'A.
June, 1818.

United States
v.
Wood.

fulness of the word used by the legislature. The best idea have met with, of what strikes me as the true use of jeopardy, is to be found in the Bible, in the 18th verse of the 5th chapter of Judges: "Zebulun and Naphtali were a people that jeoparded their lives *unto death*, in the high places of the field." Here the word means a danger of an extreme degree, approaching close to death, and such I suppose the word *jeopardy*. Perhaps the idea is a refinement. But such as it is, I think proper, after some reflection, to state it, and under the impression of at least the questionableness of the term. I shall not press that part of the case which calls for the offender's life, when it is perfectly clear upon the testimony and the law, that he is guilty of that crime which is not capital.

Mr. *Phillips*, for the prisoner, stated, that as the prosecution upon the counts which charge the prisoner with a capital offence was given up, he should submit the prisoner's case upon the other counts to the jury.

Judge Washington informed Mr. *Phillips*, that the court did not entertain the doubt which the district attorney had expressed as to the meaning of the word *jeopardy*, and that it was proper to apprise him of this in order that he might defend his client in like manner, as if no concession had been made, or doubt expressed, by the district attorney.

The counsel still submitted the case to the jury under the charge of the court.

Judge *Washington* then delivered the following charge:

The first inquiry for the jury is, whether the mail carrier was robbed of the mail, and if he was, whether it

was effected by putting the life of the carrier in jeopardy by the use of dangerous weapons, or otherwise.

PHILAD'A.
June, 1818.

The conviction of Joseph T. Hare, John Alexander, and Lewis Hare before the circuit court of Maryland, and the sentence of the court thereon, is evidence the most conclusive against the prisoner, that the crime for which those persons were severally convicted was committed by them. This is confirmed by the testimony of Boyer the mail carrier, and Mr. Ludlow the passenger.

United States
v.
Weed.

As to the nature of the offence of which Joseph T. Hare, &c. were convicted, the court does not entertain a doubt. We think that putting the mail carrier in fear, and his life in peril or danger, is putting his life in jeopardy, within the meaning and intent of the act of congress, and if the jury should be of opinion, under the circumstances which attended this transaction, that Boyer was in fear, and in danger of his life, the offence of those principals was capital. We think it our duty to give you this opinion, notwithstanding the concessions which the candor of the district attorney induced him to make. We do not, however, think it necessary or proper in this case to press this point against the prisoner; and with these few observations which have been made, I leave this point to the jury.

The next question is, whether the prisoner did aid, advise, or assist in the perpetration of a crime committed by the principals?

If Thomas Hare, who has given testimony on the part of the prosecution, is believed by the jury, he has clearly proved that the prisoner not only participated in the plan formed for robbing the mail, and aided its execution by his countenance and advice, but that he lent his pistols

PHILAD'A.
June, 1818.

United States

v.
Wood.

to the principals, with a distinct knowledge of the criminal purpose for which they were borrowed; and that he accompanied the perpetrators of the crime a short distance on their journey to the place of its intended execution. In addition to the testimony of this witness, Mr. Bailey has proved the exact similitude of the pistol found upon the prisoner at the magistrate's, and that found at Havre-de-Grace, near to the spot where the robbery was committed.

Should the jury be of opinion that the prisoner is guilty of the offence charged against him as capital, according to the explanation of the law given by the court, they may find him generally guilty. If they should think him guilty of assisting only in a simple robbery of the mail, or that the life of the mail carrier was not in jeopardy, according to the meaning of that word as given by the court, then they will find him guilty on the 3d or 4th count, and not guilty of the others. If they think him not guilty of any offence, they will find him not guilty.

The jury retired at half past three o'clock, and at five returned with a verdict of guilty. On being called over and asked separately, one of them dissented from the verdict given in; after some observations from the court they again retired, and at half past six o'clock brought in a verdict of *guilty*.

Motion in Arrest of Judgment and for a New Trial.
—The prisoner being brought before the court to receive sentence of death, Zalegman Phillips, Esq. his counsel, moved for a new trial, and in arrest of Judgment, as follows:

The defendant by his counsel, Zalegman Phillips, as- PHILAD'A,
signs the following as reasons for a new trial : June, 1818.

1st. That the verdict is against law and against evi- United States
dence. v.
Wood.

2d. That the jury have convicted the defendant capital-
ly, *to wit* : on the first, second, fourth, and fifth counts
of the indictment, when the attorney of the United
States expressly stated to them, that he did not ask a
conviction on those counts, as he considered the law
very doubtful, and would be satisfied with a conviction
on the third and sixth counts of the indictment, and
that in consequence thereof the prisoner's counsel did
not enter into any examination of the law and facts in
his behalf, as applying to the said mentioned counts, be-
lieving them to have been abandoned by the attorney of
the United States.

3d. That the jury have mistaken the law and the
facts, and have considered that the fact of John Alexan-
der and Joseph Thompson Hare having been guilty of
*"robbing the mail, by putting the life of the carrier in
jeopardy by the use of dangerous weapons,"* was not only
sufficient, but obligatory on them to convict the defend-
ant capitally, from the single circumstance of the de-
fendant's having lent his pistols ; the jury not having
distinguished between aiding and assisting to commit the
robbery, as described in the first branch of the 19th
section, and aiding and assisting to commit the robbery,
by putting the life of the carrier in jeopardy by the use
of dangerous weapons, as described in the second branch
of the said 19th section, which are distinct and separate
offences, and which were laid in distinct and separate
counts in the indictment.

PHILA'DA,
June, 1818.

United States

v.
Wood.

4th. That evidence was admitted to go to the jury, to wit: a paper called a record of a court, which in point of law was inadmissible.

Z. PHILLIPS, for defendant.

Motion in Arrest of Judgment.—Defendant, by his counsel, Zalegman Phillips, assigns the following as reasons in arrest of Judgement:

1st. That the caption of the indictment states, a circuit court of the United States of America, in and for the Pennsylvania district, to have been holden at the city of Philadelphia, when in fact and in law, there is no such district of Pennsylvania.

2d. That the indictment is the presentment of a grand inquest, styled and called the grand inquest of the United States, inquiring for the Pennsylvania district; when in fact and in law there is no such district as the Pennsylvania district; the state of Pennsylvania having been divided by an act of congress, passed previously to the presentment of the grand inquest, into two districts; one called the eastern district of Pennsylvania, and the other, the western district of Pennsylvania.

3d. That the defendant is charged in the indictment with procuring, aiding, advising, and assisting in the doing and perpetration of the robbery of the mail of the United States, without stating that the said offence was committed by putting the life of the mail carrier in jeopardy by the use of dangerous weapons.

4th. That it is nowhere stated in the indictment that the defendant procured, aided, advised, or assisted in the doing and perpetration of the robbery of the mail of the United States, by putting the life of the mail carrier

in jeopardy by the use of dangerous weapons; which offence alone is made capital.

PHILAD'A.
June, 1818.

5th. Manifest errors.

United States
v.
Wood.

The case was elaborately argued on Friday, 5th June, by Mr. *Phillips* for the prisoner, and Mr. *Ingersoll*, the district attorney, for the United States; and on Saturday the court delivered the following decision:

Washington J.—This is a motion in arrest of judgment, and various causes have been assigned; but as the decision of the court will be given on the two first, it will be unnecessary to state the others.

These were, 1st, (see the first reason in arrest of judgment,) 2d, (see the second do.)

The first objection then is to the style of the court, which, it is contended, should be the circuit court for the eastern district of Pennsylvania; this change being produced by the act of congress "to divide the state of Pennsylvania into two judicial districts," passed on the 20th April, 1818.

It is not contended that the style of the court is altered in express terms, but it is supposed to arise necessarily from the division of the state and the jurisdiction assigned to the western court. There might be some colour for this argument, if the law had created a new circuit court for the western district, in which case, there would seem to be a propriety, at least, in distinguishing that court from this, by calling that the *western*, and this the *eastern* circuit court. But it will appear from a correct analysis of the law, that the style of the western court is the *district court* for that district, in contradistinction to the *district court* for the eastern district, and that the division of the state into two districts is in reference to those courts.

PHILAD'A,
June, 1818.

United States

v.
Wood.

and on the 11th of April, some days before the passage of this act into a law, they were sworn and affirmed to inquire for the body of the district of Pennsylvania. The indictment, therefore, is with strict propriety found by the grand inquest of the United States, inquiring *for Pennsylvania district* upon oath and affirmation, inasmuch as they were legally sworn and affirmed to inquire for the whole district.

Nevertheless, there remains to be considered under this head, a very interesting question, which is, does this indictment show that this court has jurisdiction of the offence charged to have been committed by the prisoner? This question resolves itself into two others. Although the grand jury were sworn and very properly to inquire for the district of Pennsylvania, yet could they, after the passage of this law, inquire of offences committed on land out of the eastern district of Pennsylvania: and if they could not, then secondly, does the indictment sufficiently show that the offence of which the prisoner stands convicted, was committed within the jurisdiction of the court.

The court has not been able to find any act of congress, which in express terms fixes the jurisdiction of the circuit courts in criminal cases, by the place in which the offence was committed.

But the court is clearly of opinion, upon the fair and reasonable construction of the different laws upon this subject, that the jurisdiction of the circuit court in criminal cases, is confined to offences committed within the district for which those courts respectively sit where they are committed on land. See the 11th, 23d, and 29th sections of the first judicial act, and the 3d section of the act of the 2d March, 1793, vol. ii. p. 225.

It was contended by the district attorney, that the ju-

jurisdiction of the western district court does not extend to criminal cases; but the court cannot give its assent to this construction of the law. The 4th section declares that that court, in addition to the ordinary jurisdiction of a district court, shall, within the limits of the western district, have jurisdiction of all *causes*, except appeals and writs of error cognizable by law in a circuit court. Now, as it is clear that a circuit court has jurisdiction of all offences prohibited by the laws of the United States committed at sea or on land, within the district where the court sits, it follows, from the general expressions above quoted, that the western district court has the cognizance of offences limited as to jurisdiction as the circuit courts are.

PHILAD'A,
June, 1818.

United States

v.
Wood.

2. If then this court has not jurisdiction of offences committed within the western district, and the western court has, the next question is, does this indictment sufficiently show that the offence of which the prisoner is convicted, was committed within the jurisdiction of this court? The allegation in all the counts is, that the offence was committed *at the district of Pennsylvania*. It might then have been committed as well in the western as in the eastern district, and the court cannot help the indictment in this respect by any presumptions, or because we know from the evidence that the offence was committed in this city. It is indispensable that the indictment should distinctly show that the court has jurisdiction of the offence, and it ought, therefore, to have laid it to have been committed in the eastern district. And since it might be proper in some cases of a capital nature to try the cause in the county where the offence was committed, there would seem to be a propriety in stating the county

PHILAD'A, also in the indictment, though on this point we give no
 June, 1818. positive opinion at this time, the case not requiring it.

United States Upon the whole, we are of opinion, that the judgment
 v. must be arrested for the reason which has been stated.
 Wood.

SUPERIOR COURT.

TERRITORY OF NEW-ORLEANS, JULY, 1810.

In the matter of *Pierre Dormenon*.

For the law
 upon this sub-
 ject, see vol.
 I. p. 330. 515.

Present—Honourable *Joshua Lewis*.

The court having considered this case, delivered their opinion this day in writing, in the following words, viz :

In the month of June, 1809, on the motion of Mr Derbigny, founded upon the affidavit of Mr. Guiet, the following rule was obtained against *Pierré Dormenon*, to wit :

“It is ordered that *Pierre Dormenon* show cause, on the first Monday in August next, before the superior court, to be holden at the City Hall at the city of New-Orleans, why his name as attorney and counsellor at law should not be stricken off the rolls of said court, for having (as it is alleged upon oath) headed, aided, and assisted the negroes of St. Domingo in their horrible massacres and other outrages against the whites in and about the year 1793.”

At which day the said *Pierre Dormenon* appeared and denied the charge.

Whereupon a number of witnesses were called, and their examination taken in writing in open court ; and the said *Dormenon* requesting time to procure exculpatory testimony, he was allowed until the 1st day of January following.

Shortly after which day he appeared and submitted his proof and defence. N. ORLEANS,
July, 1810.

The examination in support of the charge set forth in the rule was lengthy, and is placed upon the files of the court. The witnesses appeared to be men of veracity—the credit of none has been impeached. It does not appear that either of them has had the least personal animosity towards Mr. Dormenon, or that they were actuated by motives of revenge or prosecution, or felt any other sentiment than that which the recollection of their past sufferings, in the presence of the person whom they considered to be the principal author of them, was calculated to inspire. And their testimony, if true, fully substantiates the fact charged in the rule. In the matter
of
Dormenon.

To repeal the force of this testimony, Mr. Dormenon has produced testimonial proof, (which is not denied,) that in the various public employments in which the witnesses have known him, his conduct has been without reproach, and in his private life exemplary and much esteemed; and, as an additional evidence of his having enjoyed public confidence, he has exhibited a list of appointments in the judiciary made by General Rochambeau, in the year on which his name appears.

This may be all true, but as it relates to an epoch some considerable time subsequent to the year 1793, does not contradict the witnesses, who speak of his conduct only in that year.

Mr. Dormenon, in his defence in writing, has laboured totally to discredit the witnesses against him, by attempting to show gross contradictions and absurdities in their testimony. If there be not a perfect coincidence in the witnesses in all the details of their testimony, they certainly agreed upon the important fact.

N. ORLEANS,
July, 1810.

In the matter
of
Dormeuon.

It is proved that Mr. Dormenon was a municipal officer under the commissaries Poiverell and Santhonax, in the year 1793, when the general freedom of the slaves was proclaimed. This Mr. Dormenon admits.

It is proven, also, that in that character, wearing a scarf, his badge of office, he marched at the head of the brigands, acting in concert with their leaders, whose sole purpose and employment was the indiscriminate murder and massacre of the whites who refused to conform to the orders of the commissaries; and that their conduct in various expeditions in pursuit of the whites was marked with unexampled cruelty and barbarity. It is equally in testimony, that Dormenon associated with, and was the intimate friend of De Lisle, Brisot, Faubert, and Gai, who headed the brigands in the quarter of Jacmel and Jeremy and its dependencies.

There are many circumstances detailed by the witnesses which warrant a belief of these facts. In fact, they are as satisfactorily proven as that Dormenon was a municipal officer, and can with as little plausibility be denied.

Had the same evidence of these facts accompanied Mr. Dormenon's application for admission to the bar, I have no doubt he would have been refused. The court now being possessed of it, it is equally their duty to exclude him. It is considered that the safety of this country requires that no person who has acted in concert with the negroes and mulattoes of St. Domingo in destroying the whites, ought to hold any kind of office here, however fair his conduct may since have been.

And, from the evidence, no unprejudiced mind can doubt that such has been the conduct of Mr. Dormenon. It is, therefore, ordered that the rule be made absolute.

OYER AND TERMINER.

NEW-YORK, SEPTEMBER, 1823.

The People
vs.
Jane Garretson, Susan Brown,
and Hannah Thompson. } MURDER.

Present—Honourable *Ogden Edwards*, Circuit Judge.

Richard Riker, Recorder.

Hugh Maxwell, District Attorney, Counsel for The People.

M'Ewen, Scott, and F. A. Blake, Counsel for the Prisoners.

This was an indictment against the prisoners for the murder of one Titus Oliver, which offence was alleged to have been perpetrated on the 28th day of June, 1822.

The facts developed on the trial, so far as they were material, were substantially as follows: About dusk, on the evening of the 28th day of June, the defendants fell in with the deceased and his wife at the place of residence of the latter. The deceased asked his wife for a shirt, which she refused to give him. He then extended his arm towards her; but whether to strike her, or merely to take hold of her, appeared uncertain. On this she struck him. Whether he returned the blow or not was not clearly proved; but, from the whole tenor of the evidence, a conclusion was

Meeting together, by concert, with weapons likely to produce death, and with such indications of violence as would lead to reasonable apprehensions of fatal consequences and proceeding to attack the deceased which attack results in his death, all are guilty of murder.

made, however, in pursuance of the original design, but on new provocation, the killing may be manslaughter or murder, according to circumstances; and it is in such case the duty of the jury to refer it to the new provocation, unless it clearly appear to have been on the antecedent grudge.

How far the obligation to fly exists, or how long it continues before homicide can be regarded as excusable, depends on the suddenness and violence of the attack, the imminence of the danger, and the age, strength, and sex of the parties.

Where the attack is not

N^W YORK.
Sept. 1823.

The People
v.
Garretson
and others.

fairly warranted that he did so. On this the wife, together with two of the prisoners, to wit, Jane Garretson and Susan Brown, attacked him violently with their clubs, beating him very severely; but whether the blows did or did not fall on his head did not appear, as the witnesses could state nothing with certainty on the subject. The deceased was armed with a club about the same size with those used by the prisoners, and with it resisted their attack.

At length the prisoners fled, and the deceased, still armed with his bludgeon, pursued them at full speed. After running some considerable distance, (the deceased continually after them,) and just as he had come up with them, the prisoners turned from the street into a neighbor-porch. At this moment the deceased stopped, apparently to fasten his shoe, when one of the prisoners, Jane Garretson, instantly stepped from the porch, and struck him a violent blow on the back of the head. He bled profusely—was soon afterwards taken to the workhouse, and during the night was very ill. The next morning he was taken to the alms house, where, after lingering about two days, he expired.

One witness testified that Jane Garretson, after the fray, said she had almost killed "old Tite," and that it was a pity she had not quite. It was farther proved that before the deceased took hold of, or struck his wife a second time, Susan Brown said to him, "if you strike her you shall never strike another woman;" and that after the deceased appeared to be dying, she also said, with reference to the transaction, she would kill any negro who would whip his wife.

It appeared that the deceased was an athletic man; that he manifested violent passion and anger while engaged in the pursuit; and that when he stooped to fasten his shoe he was almost, if not quite, within striking distance of the prisoners—so near, indeed, that Jane Garretson had only to advance a single step before she inflicted a blow.

It was not proved, on the part of the prosecution, that the prisoners came together at the time of the affray by preconcert, or otherwise than by mere accident, nor that any threats had been uttered by either of them in relation to the deceased.

NEW YORK,
Sept. 1823.
The People
v.
Garretson
and others.

F. A. Blake, in opening the defence, adverted, in an argument of considerable length, to the discrepancies in the evidence on the part of the people, and to the apparent interest and warmth manifested by some of the witnesses. He contended, that these circumstances so far impaired their credibility, and introduced so much confusion and uncertainty, that it would be altogether unsafe to convict the accused. Without entering into these details, we shall merely advert to the principal points of law on which he urged an acquittal.

We concede, said the counsel, that if the prisoners at the bar had met together by concert, armed with weapons likely to produce death, in such numbers, and with such indications of a violent intention as would lead to a fair, and reasonable apprehension of *fatal consequences*, and if, in the prosecution of their unlawful design, they had proceeded to an attack on the deceased which had resulted in his death, all concerned in the riot would have been answerable, in the fullest extent, for the consequences of their *common enterprize*, and would, in judgment of law, have been guilty of murder. (1 Eas. Pl. Cr. 257, 8, 9. Ibid. 293. 4 Bl. Com. 200. 1 Hal. Pl. Cr. 53, 442. 445. 1 Haw. Pl. Cr. c. 29. s. 10. c. 31. s. 46. 2 Roll. Rep. 120. Kelynge, 117. 1 Hal. His. P. C. 39.)

We maintain, however, that the present case does not fall within this rule. No evidence of preconcert has been adduced. The assemblage of *three women*, even with an intent to beat the deceased, surely cannot be considered such a *dangerous coalition* as to jeopardize life or limb. The weapons with which they were armed, though they *might by possibility* produce death, were not such as, in the hands of females, would *probably* lead to fatal conse-

NEW YORK,
Sept 1823.

The People
v.
Garretson
and others.

quences ; and in cases like the present, regard is always had to the *age, strength, and sex* of the respective parties. If assault and battery, or any other *mere trespass*, was all the prisoners intended, or if the jury have reasonable doubts whether more was intended or not, they can, at the most, convict of manslaughter only, even supposing the fatal blow to have been struck in the course of the original affray. The quarrel was sudden and unpremeditated ; and it does not appear that any malice existed on either part. (1 Eas. Pl. Cr. 232. 252. 258. 4 Bl. Com. 193. 200. 1 Hawk. Pl. Cr. c. 30. 3 Inst. 55. 57. 2 Chitt. Crim. Law, 484.)

Again ; it is a fair conclusion, from the testimony introduced on the part of the people, that the deceased was actually beating his wife, or had at least attempted to do so, before he was struck by either of the prisoners. It was the right, nay, it was the duty of every one who was present to interfere, with a view to the prevention of so disgraceful a violation of the peace and order of the community. Such was the right, and such the duty of the prisoners at the bar. If force was necessary, and that it was no one can deny, they were justified in making use of any degree of violence necessary to the accomplishment of their purpose, short of such as would *clearly and manifestly endanger the life or limb of the deceased* ; and if death did accidentally ensue, it is not, under these circumstances, to be imputed to them as a crime. If the persons interfering had been MEN, equal or superior in point of strength to the aggressor, their most proper course would have been to drag him from the wife he was abusing. But when *women* interfere to protect one of their own sex from the savage and brutal attacks of a MAN, it cannot be expected that they will measure, with scrupulous precision, the degree of violence they employ, nor will the law require them so to do. They are justified by necessity in using much force ; nor can that which was exerted in the present instance be considered unreasonable ; and if an un-

lucky blow did terminate the existence of the assailant, his fate is to be attributed to his own unmanly attack on a defenceless female, whom he was bound by the laws of God and of man to cherish and protect. His blood rests on his own head! Even if the court and jury should conceive that less dangerous weapons might have been more proper, they are bound to exercise a tender consideration and regard towards the real intentions and motives of the accused. (1 Eas. Pl. Cr. 260, 261, 262.) We contend, therefore, that if the deceased met his death in the original affray, and owing to blows inflicted by the prisoners in the protection of his wife, the jury are bound to render in their favour a verdict of not guilty. (1 Hwk. Pl. Cr. 29. 1 Hal. Pl. Cr. 473, 4. Cowp. Rep. 832. per. Ld. Mansfield. Keilw. 108. Bro. C. 148. See Kelynge, 41.)

N^W YORK,
Sept. 1823.

The People
v.
Garretson
and others.

Let us for a-moment, however, grant to the counsel for the people all he can possibly ask, to wit, that if Titus Oliver had been killed by the prisoners, or either of them in the course of the original affray, it would have been manslaughter in all. This, I say, is all which can be demanded, inasmuch as there was no premeditated and dangerous assemblage—as the affray was sudden—as the parties were equally armed—and, particularly, as the weapons used by the prisoners were not such as manifestly endangered the life of their antagonist. Under these circumstances they are guilty of manslaughter at the most; and it matters not, in point of law, whether they or the deceased gave the first provocation, or struck the first blow. (1 Hal. Pl. Cr. 456. 5 Burr. Rep. 2793, 4. 1 Eas. Pl. Cr. 255. 257. 1 Hawk. Pl. Cr. 82. 2 Burn's Jus. 591, 2. 2 Chitt. Cr. Law, 484. 1 Eas. Pl. Cr. 241. 246.

But even under these concessions as to the *law*, the *facts* which have been developed in the case at present under consideration would not warrant a conviction of the crime

NEW YORK,
Sept. 1823.

The People
v.
Garretson
and others.

of manslaughter. No witness has testified that the deceased, in the course of the *original affray*, was struck on the head. He appears, after that affray had terminated in the flight of the prisoners, to have pursued them a considerable distance, with a degree of speed utterly incompatible with the supposition that he had previously received a mortal injury. The position of the wound which occasioned his death was such as fairly to warrant the conclusion that it was inflicted by the blow struck by one of the accused while he was sleeping, and it was not until subsequent to that blow that he was seen to bleed. This must have been the period when the death-blow was inflicted. Let us see, then, how the law stands, granting this to be the fact, and keeping always in view the propositions (which I presume will not be controverted by the counsel for the people,) that no premeditated malice existed at any stage of the transaction, and that its existence is essential to constitute the crime of murder.

If the prisoners, in killing Titus Oliver in the original contest, would have been guilty of *manslaughter*, which we have for the present conceded, we do not urge even their subsequent flight—the pursuit of the deceased—the rage and excitement which he manifested during that pursuit—the imminent danger to which they were exposed when he had at length overtaken them,—nor, in fine, do we insist on the difference of sex, as a *justification* of subsequent homicide. The law is tender of life, and demands that the same tenderness should be exercised by those to whom its protection is extended. It will not, therefore, *justify* any one in depriving society of a member, and a fellow creature of existence, unless the person so doing is wholly *without fault*. (1 Eas. Pl. Cr. 277, 8. 1 Hawk. Pl. Cr. c. 28, s. 13. 22. Crom. 27. b. 1 Hal. Pl. Cr. 56.)

We contend, however, that although the prisoners are not

justified by the law, under the view of the case we are at present taking, in destroying the life of Titus Oliver, their offence has been merely nominal. It falls within the definition of *excusable homicide in self-defence*; a crime, if it be one, which, however severely it was punished in former times, is, at present, regarded at law as the most venial of all transgressions. Indeed, it now owes its place in the catalogue of offences, rather to a technical adherence to antiquated definitions, than to any real imputation of criminality or guilt. (2 Burns Jus. 589. 3 Inst. 56. 1. Hawk. 76. 1 H. H. 493. 4 Bl. Com. 188. 1 Eas. Pl. Cr. 282.) Let us, in the first place, consider the law on this subject, and then see how far the acts of the accused fall within its principles.

N^W YORK,
Sept. 1823.

The People
v.
Garretson
and others.

If A. and B. meet on previous *compact*, to fight with deadly weapons, and death ensues in the course of the combat, it is murder; nor will the case be altered if A. *fly*, and being pursued and overtaken by B., turns and slays him. However imminent may be the peril of A.—however great may be the danger to which he is exposed—the *deliberate malice and preconcert* attach to the whole transaction. Where these originally existed, a subsequent flight operates not as an extenuation of the offence. (1 Hal. Pl. Cr. 479. 481. 483. 4 Bl. Com. 184. 1 Eas. Pl. Cr. 282. 285. 2 Burns Jus. 588.)

This has been doubted by an able writer, Mr. Dalton, who has held that even where the original assault was on *malice prepense*, the crime is reduced to excusable homicide *se defendendo*, by the *flight* even of the *aggressor*. Hawkins and East have considered this opinion worthy of much comment and discussion; but the law is, at the present day, settled as I have stated it. (Crompt. fol. 22. b.)

But the case is far different where A. and B. *suddenly* quarrel, and a combat takes place, even with deadly wea-

N^W YORK,
Sept. 1823.

The People
v.
Garretson
and others.

pons. This does not betray, on the part of either of the combatants, the deliberate malice—the cool and determined contempt of legal restrictions, and the heart devoid of social duty, which are essential ingredients of the crime of murder, and which render it the duty of a court of justice to take away the life of the offender. In such a case, the humanity of the law allows even the *assailant* the benefit of repentance. If he does repent—if he abandon the conflict, and fly, not with a view to the *evasion of punishment*, but with a sincere and honest intention to escape from strife, his antagonist follows at his peril. If he be overtaken, and afterwards slay his pursuer in self-defence, the benignity of the law exempts him from punishment, even though he were originally in fault. (1 Eas. Pl. Cr. 281. 1 Hal. Pl. Cr. 482. 4. Bl. Com. 185. 2 Burns' Jus. 588.) This principle is consonant with expediency and sound policy; for even when crime has been commenced, it is surely better by encouraging repentance to arrest its progress, than to destroy, by indiscriminate punishment, the principal inducement to the relinquishment of a criminal design. Under such circumstances, the law, as it stands at the present day, entitles the prisoner to a full and unqualified acquittal. (Fost. Cr. Law, 288. 4 Bl. Com. 188.)

The *existence* and *continuance* of the obligation to fly depends, in all cases, on the magnitude and imminence of the danger to which the retreating party is exposed. (Selfridge's Trial, 160. Hawk. Pl. C. c. 29. § 13.) In the charge delivered by his honour C. J. Parker, (a judge whose talents and erudition need no comment,) in the trial of T. O. Selfridge, the principal is clearly and forcibly stated: "The jury are bound to consider the rapidity and violence of the attack—the nature of the weapon with which it is made—the place where the catastrophe happened—the muscular debility or vigour of the defendant, and his

power to resist or to fly. (Selfridge's trial, 164.) Can it be denied, that in the present case each of these considerations must operate most forcibly in favour of the prisoners?

N^W YORK,
Sept. 1823.
The People
v.
Garretson
and others.

In the present instance, then, we care not which party was originally in fault: the accused are wounded women; if they did commence an unfortunate quarrel they had abandoned it and fled. They had evaded the pursuit of the deceased, until flight was no *longer* consistent with a common regard to personal safety. When at length retreat was no longer practicable, they availed themselves of an opportunity which providentially occurred of securing their own lives, at the hazard of that of their pursuer; and in so doing, they were excused by the dictates of reason, and by the first principle which the God of nature has implanted in every bosom—the principle of self preservation, as well as by the laws of their country.

The counsel concluded by stating that witnesses would be introduced who would prove that the character of Jane Garretson, the individual particularly implicated, was that of an honest, industrious, and peaceable woman.

Witnesses were accordingly called, and examined by Charles McEwen, Esq., on behalf of the prisoners. They represented the character of Jane Garretson to be good—but one witness stated that about an hour previous to the affray, several women, among whom were the prisoners, came into his store near the residence of the deceased, armed with clubs, and stated that they were in pursuit of a damned negro, whom they would kill if they could find him.

Scott, in his argument, recapitulated the evidence, and cited several authorities in favour of the prisoners, in addition to those introduced in the opening of the defence. When he concluded, Blake observed to the court that the case had assumed, owing to the statement of the witness last examined on behalf of the prisoners, a

N^W YORK,
Sept. 1823.

~
The People
v.
Garretson
and others.

most solemn and important character. That the testimony to which he alluded seemed, at first blush, to establish a killing with *malice prepense*, and that, under these circumstances, he felt it his duty to request permission again to address the jury. He admitted that this course was not sanctioned by the ordinary practice of the court, but presumed that in a case of so much moment as the present, it would not be objected to. No objection was made, and he proceeded.

He contended, that even granting it would have been murder in the prisoners, if the deceased had been killed in the original affray, and in the *prosecution of their original design*, it was nevertheless, the duty of the jury, under existing circumstances, to render a verdict of acquittal, on the following grounds:

Where an old quarrel has existed between individuals, and, owing to the animosity it had excited, the one kills the other, it is clearly murder; but if they meet, and *new provocation* is given, which, in the absence of all former malice, would have reduced the offence, it is the duty of the court, unless it clearly and distinctly appears that the killing was occasioned by the antecedent grudge, to refer it to the new provocation, and it is merely manslaughter (Fost. 68. 2. Chitt. C. L. 482. 1 Haw Pl Cr. c. 31. s. 30. 1 H. H. P. C. 452. Crom. 23. a. Dal. cap. 93. 1 Roll. W. 360. 3 Bulst. 171. 1 Hal. P. C. 452. 455. 3 Ins. 48. 4 Bl. Com. 193. 200. 1 Hal. Pl. Cr. 440. Ibid. 49. 1 Eas. P. C. 224. 225. Self-ridge's trial 123.) He farther urged that in this instance, whatever might have been the previous malice of the accused, it clearly appeared that the immediate cause of the killing arose on the instant, to wit, from the violence offered by the deceased to his wife. If, therefore, his life had been destroyed in the original contest, it would have been but manslaughter; and the subsequent flight of the prisoners would still reduce their crime to the nominal offence of ex-

cusable homicide *se defendendo*, or in self defence. On this ground he insisted on a verdict of not guilty.

N^W YORK
Sept. 1823.

Maxwell, for the people, admitted with much ingenuousness the authority of the cases cited by the prisoner's counsel, and granted that fresh provocation had been given, *at the time of the killing*, sufficient to reduce the crime of the prisoners below the degree of *murder*. He insisted, however, that they had not fled as far as possible, and that as the deceased had desisted from pursuit at the time when he was stricken, their danger was not so imminent as to require the extreme violence which they actually used. He claimed therefore a conviction of *manslaughter*, as due to public justice and to the laws of the land.

The People
v.
Garretson
and others.

The charge was delivered by his honor *Ogden Edwards*, and reflected much credit on his abilities, his learning, and his humanity. He recognized the principles of law insisted on by the counsel for the prisoners, and expressed a decided opinion, that the crime amounted merely to manslaughter. He observed, however, that it would be the duty of the jury to convict of the latter offence, unless they considered the original attack of the prisoners entirely justifiable. That the deceased, at the time when the fatal blow was inflicted, appeared to have relinquished his pursuit; and the killing could not therefore be considered as a case of excusable homicide in self defence.

The jury retired, and after considerable deliberation returned their verdict *not guilty of murder, but guilty of manslaughter*; at the same time recommending the prisoner, Hannah Thompson, to the mercy of the court.

Sentence, imprisonment in the state prison of the southern district of New York at hard labour, for the following terms, to wit: Jane Garretson for the term of five years, —Susan Brown for the term of four years, and Hannah Thompson for the term of three years.

CIRCUIT COURT.

LANSINGBURGH, (New York) JUNE, 1804.

The People }
 vs. } LIBEL.
John Tracy. }

Hon. *Smith Thompson*, Justice.*Foote*, Counsel for the People.*Van Vechten*, Counsel for the Defendant.

In an indictment for a libel, the truth may be given in evidence; but merely as an item to show the intent. Private libels, on the natural defects of individuals, are the more malicious for being true.

The publication from which the libellous matter is extracted, may be read after the truth of the innuendoes upon the record are proved.

See Buckingham's case ante.

At a circuit court held in this county, before his honour Judge Thompson, came on the trial of Mr. Tracy, on an indictment for a libel on Morgan Lewis, Esq., chief justice of this state. The indictment was found at a court of general sessions in October last, and was removed by *certiorari* into the supreme court. The words set forth as libellous on the record were extracted from a publication in the Lansingburgh Gazette, of the 23d August last, stating a decision of the chief justice on the trial of Harry Croswell, accompanied with some remarks, and were as follows: "The Judge (Lewis) on the trial refused Mr. Croswell the privilege of producing his witnesses;" the following words, but which did not appear upon the record, concluded the sentence,—"declared that he would not suffer them, were they present, to open their lips to prove the truth of what Croswell had written; and expressly charged the jury that it was entirely immaterial whether the libel was true or not; that it was not for them to consider whether the words amounted to such a libel as ought to be punished; that whether the motives of the defendant were good or bad was wholly out of the question; that if the jury was satisfied that Croswell was the publisher, and that the innuendoes were properly proved, they must pronounce a verdict of guilty." The other parts of the publication consisted of observations naturally arising from a reflection on the consequences which would necessarily result from so alarming, so dangerous a doctrine. The whole was a republication from the Ulster Gazette.

The publication being admitted by the defendant, his honour the judge remarked to the counsel, that as the law relative to libels had not yet been settled by the supreme court, he was at liberty to be governed by his own opinion. He then observed, that although a different decision had been made on a late trial, he should permit the truth of the words set forth on the record to be given in evidence, not as a justification, but as an item to show the *intent* of the defendant; and should submit generally to the consideration of the jury both the law and the fact.

Van Vechten, the defendant's counsel, offered himself as a witness. He stated that he was present at the trial of Mr. Croswell, and that the C. J. refused an application to postpone said trial, for the purpose of giving Mr. Croswell time to procure a witness to prove the truth of the publication for which he was indicted; and declared that he would not permit his witnesses to be sworn were they in court. He also produced a copy of the case made for the Supreme Court after the trial of Mr. Croswell; from which it appeared, that the chief justice charged the jury that it was no part of their province to inquire or decide on the intent of the defendant; or whether the publication was true, or false, or malicious; that the only question for their consideration and decision was, whether the defendant was the publisher of the piece charged in the indictment; and second as to the truth of the innuendoes; that if they were satisfied as to these two points, it was their duty to find him guilty.

The truth of the words upon the records being thus proven, *Foot*, the district attorney, moved for leave to read the jury the whole of the publication from which they were extracted. This was objected to by the counsel for the defendant. The objection, however, was overruled.

Mr. *Van Vechten* observed that it was for the jury to determine whether the proceedings in our courts of justice might with safety be published; whether the conduct of our public officers was to be shielded from the public eye; whether the liberty of the press was to be preserved in this country; whether a printer should be punished for publishing the truth. He contended, that as from the nature of our government all its officers were amenable to the people, were in fact their servants, it was necessary, it was indispensable that

LANSING-
BURGH,
June, 1804.

The People
v.
Tracy.

LANSING-
BURGH,
June, 1804.

The People
v.
Tracy.

their proceedings should be published, that they might be known. He dwelt at some length on the importance of the trial by jury, and urged the necessity of their resisting every attempt to encroach upon their privileges. He also contended, that as the publication in question related to the official conduct of a public officer, its truth, which had been fully proven, ought to be considered as a complete justification.

Mr. Foote attempted to persuade the jury that the words on the record were false; for that the refusal of the C. J. to allow *Mr. Crosswell* the privilege of producing his witnesses was not on the trial, but on the discussion of a preliminary question before the jury was sworn.

His Honor Judge Thompson then addressed the jury; and in a very impartial and perspicuous charge explained his ideas of the law on the subject of libels. He stated, that in his opinion the jury were confined in their inquiry to two points: 1st, whether the defendant was the publisher, and whether the innuendoes were proved; 2d, the intent, whether innocent or malicious. He repeated his opinion, as before given, that the truth of the publication ought to be considered merely as an item to show the intent; for there might be cases, he said, in which the truth of a libel would be no justification. Such, for instance, were those private libels which published the natural defects of an individual, and which ought to be considered the more malicious for being true. He, however, submitted both the law and the fact to the consideration of the jury. He averted the distinction attempted to be drawn by the district attorney, as before mentioned, and stated it to be immaterial, as he considered the preliminary proceedings alluded to as forming a part of the trial; and observed, that he had no doubt but that the words set forth upon the record were substantially true. In the course of the charge he declared to the jury, that although his opinion differed from that of the C. J., still he believed the latter to have been governed in his decision, on the trial of *Mr. Crosswell*, by the best motives, and from the fullest conviction of its correctness.

The jury retired to their room, and in a few minutes returned with a verdict of NOT GUILTY.

OYER AND TERMINER.

NEW YORK, MARCH, 1824.

The People }
 vs. } MURDER.
John Johnson. }

Present—Hon. *Ogden Edwards*,
 Hon. *Richard Riker*, Recorder.
 Ald. *King, Zabriskie, Parker, and Doughty.*

Hugh Maxwell, Esq. District Attorney, Counsel for the
 People.

Price, Dr. Graham, and Mc Ewen, Esqrs. Counsel for
 the Prisoner, assigned by the court.

NEW YORK,
 March, 1824.
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 The People  
 v.  
 Johnson.

The Court opened at 11 o'clock; the Grand Jury were  
 sworn and charged, and the Petit Jury called, and their  
 excuses heard.

Where sepa-  
 rate and dis-  
 tinct felonies

are charged in different counts in the same indictment, the court have a discretion to com-  
 pel the prosecuting attorney to elect the counts he intends to rely upon.

The court will not interfere unless the prisoner is embarrassed in his plea or chal-  
 lenges, in consequence of the separate felonies charged in one indictment.

Alleging in the several counts of an indictment that the prisoner feloniously killed, &c.  
 A. B. C. D. and E. F., when the person who was charged to have been murdered was  
 called by each of these names, is not such a case as will embarrass the prisoner in his  
 pleas or challenges, or in which the court will interfere.

Decision of the court upon interrogatories to be put to jurors. See page 367.

Neither the court or counsel are concluded by interrogatories put to jurors. Their  
 competency must be settled by triers.

It is no objection to a juror, that he has heard reports of the subject matter to be tried,  
 nor even if he has made up his mind upon it; if he is able to find a verdict upon the  
 testimony offered at the trial, independent of such reports, he is a good juror.

There is no law in this country requiring the presence of counsel at the examination  
 of a prisoner.

It is no objection to reading the examination of a prisoner (who denies it to be free  
 and voluntary at his trial) that he was taken out of prison to the dead body of the person  
 he was charged to have murdered, and was requested by the officer to touch the body,  
 and did so; and from thence was taken to the examining magistrate in excessive pertur-  
 bation of mind, and there confessed all the particulars of the murder. *Parol* evidence  
 of facts disclosed by third persons, in the presence of the prisoner and assented to by him,  
 cannot be given in evidence if it appears that the prisoner was at the time under ex-  
 amination. It should make part of the examination itself.

N<sup>W</sup> YORK.  
March. 1824.

The People  
v.  
Johnson.

*Richard Hatfield, Esq.* Clerk. Johnson, stand up and hold up your right hand.

The prisoner was charged in an indictment as follows :  
“ *City and County of New York, ss.* The jurors of the people of the state of New York, in and for the body of the city and county of New York, upon their oath present, that John Johnson, late of the first ward of the city of New-York, in the county of New York aforesaid, labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the twenty-first day of November, in the year of our Lord, one thousand eight hundred and twenty-three, with force and arms, at the first ward of the city of New York, in the county of New York aforesaid, in and upon one James Murray, in the peace of God, and of the people, then and there being feloniously, wilfully, and of his malice aforethought, did make an assault ; and that the said John Johnson, with a certain hatchet, made of iron and steel, of the value of one dollar, which he, the said John Johnson, then and there had and held in both his hands, him the said James Murray, in and upon the left side of the head near the temple of him, the said James Murray, then and there feloniously, wilfully, and of his malice aforethought, did hit and strike ; and that the said Johnson did then and there give unto him, the said James Murray, by such striking of him with the hatchet aforesaid, one mortal wound of the length of four inches, and of the depth of one inch, in and upon the left side of the head, near the left temple of him, the said James Murray, of which said mortal wound, he the said James Murray, then and there instantly died ; and so the jurors aforesaid, upon their oath aforesaid, say, that the said John Johnson, him the said James Murray, in the man-

ner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, in contempt of the people of the state of New York, and their laws, to the evil example of all others in like case offending, and against the peace of the people of the state of New York, and their dignity."

NEW YORK,  
March, 1824.

The People  
v.  
Johnson.

The indictment contained eight counts, in each of which the description of the *instrument*, or the *name* of the deceased, was varied, so as to meet the proof expected to be given at the trial. He was called *Murray, Maury, Clark*, and a *person unknown*.\*

*Clerk.* How say you, are you guilty or not guilty?

Before the prisoner answered,

*Price*, his counsel, called upon the District Attorney to elect the counts upon which the prisoner was to plead. He contended that the election must be made before pleaded, or the prisoner would lose the benefit of his objection. It appeared, he observed, from the record, that the prisoner was indicted for the murder of more than one person, and that it was clearly illegal to charge distinct felonies in the same indictment, and referred to 1 Chit. C. L. 252.

*Maxwell*, District Attorney, replied, that he was not bound to elect on which count of the indictment he intended to rely. He was aware of an authority in Chitty, vol. 1. p. 252. which seemed to warrant the doctrine contended for by the counsel for the prisoner, but he could satisfy the court by a reference to other books and cases, that the dictum in Chitty was unsupported by the very cases he referred to.

Mr. *Maxwell* read from 1 Chitty's Criminal Law p. 252; and from 3 T. Rep. p. 103. Young's case, he read

\*The deceased was a stranger, who had but a few days before arrived in this city from Boston, and some uncertainty existed as to his true name, hence the necessity of the different averments in the indictment.

N<sup>W</sup> YORK,  
March, 1824.

The People  
v.  
Johnson.

lord Kenyon's, Justice Ashurst's, and Justice Buller's opinions, to show the court would not quash an indictment even when distinct and separate felonies were laid in it. He also read the case of the King v. O'Coigly, St. Tr. vol. 26. p. 1203. After observing upon these cases, the counsel remarked, there were others he might refer to, but he thought it unnecessary; they were all contrary to the dictum in Chitty, and concluded by observing, that they had no analogy to this case. He had indicted Johnson but for one offence, to wit, the murder of James Murray. That it was well known to the court, that it was often necessary to vary the name of the person supposed to be murdered, in order to meet the proof expected to be offered. There was but one charge, and that modified to meet the circumstances of the case. In this case it was indispensable; it arose from the uncertainty of the name of the deceased, and could not be avoided. Here, he observed, is a man murdered in a foreign country. He was a perfect stranger in the city; some called him by one name, and some by another, and it was necessary to lay it so in the different counts. That there was nothing unreasonable in the rule must be apparent.—Suppose a child murdered upon the wharf, and thrown into the river, and it was not known whether it was a male or female; would it not be necessary to charge it as a male child, and also as a female child, in the indictment?

Mr. Price. The situation I stand in is none of my seeking. I am here to defend a man on a charge of murder. I should feel myself guilty of that crime if I neglected to make all legal objections that are calculated to serve the interest of my client. The application before the court is to compel the District Attorney to specify the counts the prisoner is to plead to. The District

Attorney contends that he cannot be compelled to elect upon which of the counts he intends to offer evidence, because it is apparent to the court, that he intends to offer evidence against the prisoner, but for the murder of *one person*, and of course of but one offence. But how is the court to know this? They know nothing of the case but what they have learned from the record, and by that instrument it appears the prisoner is charged in one count for the murder *James Murray*, and in another for the murder of *Timothy Murray, &c.* How does it appear to the court they are the *same person*? It is extremely important to the prisoner that he knows the charge against him, in order to frame his plea to meet it, and to have the benefit of challenges. I make this application to the court; they are to dispose of it as the solemn nature of the case now before them requires.

N<sup>W</sup> YORK,  
March, 1824.

The People  
v.  
Johnson.

*The Court.* Without entering farther into the law, the opinion of the court is, that they have discretion, and may compel the district attorney to select the counts in the indictment he intends to rely upon.\* That it was a

\*The words of justice Buller in *Young's case* (3 T. Rep. p. 106.) are as follows:—"But if it appear, before the defendant has pleaded or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury. For he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other, but these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed. I did it at the last sessions at the Old Bailey, and hope that in exercising that discretion, I did not infringe on any rule of law or justice. But if the case has gone to the length of a verdict, it is no objection in arrest of judgment. If it were, it would overturn every indictment which contains several counts."

N<sup>W</sup> YORK,  
March, 1824.

The People  
v.  
Johnson.

discretion to be exercised upon a full view of the case. Where it appeared to the court that distinct and separate offences were charged in one indictment, which confused the prisoner in his pleas and challenges, they would give him relief by compelling the District Attorney to elect upon which count he intended to rely. Here it is obvious the indictment contains but one charge, although modified to meet the proof in the different counts. The court can see no hardship upon the prisoner in this case. Their opinion, therefore, is, that the prisoner must plead to the indictment.

*Clerk.* John Johnson, are you guilty, or not guilty?

*Pris.* Not guilty.

*Clerk.* Are you ready for trial.

*Pris.* Yes. Will be ready to-morrow morning.

*Clerk.* Have you counsel?

*Pris.* Yes.

*Clerk.* Do you wish the court to assign you more?

*Pris.* No.

The court adjourned to Tuesday morning, at 11 o'clock, A. M.

#### TUESDAY, MARCH 16.

The court met at 11 o'clock, A. M.

Present—The same justices as yesterday.

From the very great crowd in the room and in the avenues to the Hall, all the witnesses on the part of the people did not answer when called.

Mr. Maxwell observed, that it would be impossible for him to proceed, until the witnesses came in. He had no doubt they were among the crowd, but could not get in.

The court directed the panel to be called, and by that time it was supposed the witnesses would come.

The court directed the clerk to swear the gentlemen, upon the panel who had belonged to the artillery, and who were suspended yesterday. The court decided that artillery-men are not exempted by the statute to serve as jurors after they cease to be artillerymen. N<sup>W</sup> YORK,  
March, 1824.  
The People,  
v.  
Johnson.

The petit jury were then called, and the challenges made. The prisoner made peremptory challenges, and challenges for favour.

Albert D. Spear was called, and Mr. *Price* prayed the following questions to be put (as in *Selfridge's* case,) to each juror, as he came to the book to be sworn. 1st. Have you heard any thing of this case? 2d. Do you feel any bias or prejudice for or against the prisoner in this case?

*By the Court.* The only object of interrogating jurors is to ascertain whether they are prejudiced for or against the prisoner. The court or the counsel for the prosecution would not be concluded by the answer. The question of competency must be settled by the triers appointed according to law. The court do not mean to sanction the particular mode now suggested. You may however ask the questions.

Recorder *Riker* referred the counsel for the prisoner to *Milligan* and *Welchman's* case, for robbing the *Phoenix Bank*, *City Hall Rec.* vol. 6. p. 71.

On advisement among the members of the court, they adopted the questions put in *Milligan's* case. The questions were,

1st. Have you, at any time, formed or expressed an opinion, or ever entertained an impression which may influence your conduct as a juror?

2d. Have you any bias or prejudice on your mind for or against the prisoner?

N<sup>W</sup> YORK,  
March, 1824.

The People  
v.  
Johnson.

3d. Do you, in every respect, according to the best of your knowledge or belief, stand perfectly indifferent between the people and the prisoner.

*Price* requested the court to so frame the interrogatories that the answer in the affirmative or negative would embrace the case, and preclude farther questions.

*By the Court.* The prisoner must be tried according to law. We cannot frame any question to preclude explanatory ones being put by either party. The court cannot decide upon the competency of the juror. If challenged for favour, triers must be appointed. The juror was challenged for favour by Mr. Price. The court appointed John Anthon and Charles King, Esqs. to decide upon the competency of the challenged juror.

The triers were sworn well and truly to try the juror, to answer the questions put to him.

*Price* put the questions. Have you formed and expressed an opinion, or ever entertained an impression which may influence your conduct as a juror, &c.? as in *Milligan's* case.

Mr. Spear answered he had unfavourable impressions against the prisoner. I have read his confession.

*Mr. Maxwell.* Notwithstanding your impressions, and what you have heard, is your mind free to make up a verdict upon the evidence that will be offered, exclusive of what you have read and heard?

*Price.* In a case involving the life of a person, the juror should be free—his mind should be as a blank piece of paper. The juror himself can hardly know his own bias. Mr. Spear has read the confession of Johnson in a handbill, circulated through the town by some person. A great many persons have been summoned as jurors—is it not possible to obtain an impartial jury? I do not mean a jury who have never heard of this case, but a jury

who are impartial. We can certainly find such a jury notwithstanding the excitement.

N<sup>W</sup> YORK,  
March, 1824.

The People  
v.  
Johnson.

*Maxwell.*—If the doctrine contended for by the counsel for the prisoner were adopted, every culprit would go unpunished. Jurors feel as men. That they feel a prejudice against the enormity of a great crime is natural. It is not a prejudice or bias against the man, but against the offence. What would be the consequence of such a doctrine if sustained by the court? The party himself might excite and keep alive those prejudices. In that case he never could be tried at all. The juror says he has heard the reports of the murder, and has read the handbill detailing the confession; but he nevertheless says he is competent to render a verdict upon the evidence. With the greatest respect, I think Mr. Spear is a competent juror.

*By the Court.*—A juror must approach the box with impartiality. The opinion that the juror has made up his mind may be predicated upon a hypothesis that if the report is true or not true, the prisoner is guilty or not guilty. The mere circumstance of a juror having formed an opinion upon reports and newspaper publications, is not an objection against him. If a juror is able to make up a verdict upon the testimony offered on the trial, independent of the reports he has read and heard, he is certainly a good juror.

*Clerk,* to the triers. How say you, do you find the challenge true or not true?

*Triers.*—Not true.

The juror was sworn.

The prisoner challenged eighteen jurors peremptorily, and twenty-two for cause shown.

And the following jurors were sworn. Robert Stod-

NW YORK,  
March, 1824.

The People  
v.  
Johnson.

dard, Joseph Middlemast, Timothy Kellogg, Richard Harding, Barnet Audariese, William Hitchcock, Dennis Ward, John Degez, James L. Bleecker, Alexander Robertson, Isaac L. Jaques, and Michael Immanuel.

*Mr. Maxwell.* Gentlemen of the Jury, The prisoner is now to be put upon trial for the crime of murder—a crime against the laws of God and man. In a crime of such a deep dye, it is necessary that satisfactory evidence should be offered—that the prisoner should have a fair trial. But however anxious the counsel for the prisoner may be to find some difficulty, some doubt in the case, it is my duty, gentlemen, to say to you, that the proof will be of so satisfactory a nature, that you will find little or no difficulty in the investigation of it. The witnesses against the prisoner are all people of good character—they are strangers to him—have no malice or ill will to gratify. They will develop such a chain of facts and circumstances, that nothing but the hand of a superintending and all-wise Providence could have brought to light, as if for the detection and punishment of this foul murder. It would appear that the deceased was a young man of good character. He was not a native of this country. Had just come from Boston, where, by honest industry, he accumulated upwards of \$300. He arrived here in the sloop Fulton, on Tuesday the 18th of November—slept on board the sloop until Thursday. It would appear by the testimony of Young, the steward on board the sloop, that he saw Johnson on the wharf on Wednesday, speaking to the deceased, and that he came again on Thursday, and assisted the deceased to carry away the trunk. The deceased told Captain Morehouse, the captain of the sloop, that he was going to board in the lower part of the city. It would appear by the testimony, that the deceased left the vessel on Thursday, and the people on board neither saw or heard

of him until Sunday, when the dead body was immediately recognized by them as the body of Murray. Under the direction of an all-wise Providence, I shall be able to fix the guilt of this murder upon the prisoner, beyond all doubt—not only by the testimony of the people on board, but by the officers of the police who arrested Johnson and searched his premises—from the circumstances of the case, and from the confession of the prisoner himself.

N<sup>Y</sup> YORK,  
March, 1824.

The People  
v.  
Johnson.

On Sunday, the officers took Johnson as he was coming from church, where he had been, I hope, to worship! He was arrested by Mr. Hays, and while under arrest, as the steward of the sloop Fulton was approaching in order to identify him, the prisoner exclaimed, "this scares me." The prisoner was brought to the police office and was examined. He denied all knowledge of the deceased—had never been at his house—knew nothing of his chest. While Johnson was under examination, the officers of the police searched his house, found a bloody sheet, truss and clothing, all in places not usual for those articles. On Monday Mr. Kip recognized the deceased as the same person who was in company with Johnson with a chest, which they employed him to carry to Johnson's house.

Mr. Maxwell then detailed the circumstances of finding the chest of the deceased under Johnson's bed, a bloody shirt and bloody handkerchief, the clothes of the deceased—his second examination. He also detailed the circumstances of finding the money in the sand bank at Brooklyn—the blood traced from Johnson's bed-room to the cellar—the particulars and manner of the death of the deceased—the finding of the body in Cuyler's Alley—the exhibition of the body at the hospital, and its recognition, &c.

Mr. Maxwell concluded, by observing he was not wil-

NEW YORK,  
March, 1894.

The People  
v.  
Johnson.

ling, by any address to the jury, to inflame their minds against the prisoner—there could be no necessity for it, for he apprehended the jury would be under the necessity of exerting themselves to resist their feelings and indignation of such a public outrage. He then proceeded to call the witnesses.

*Charles Miller sworn.*—Is a city watchman. On Saturday, the 22d Nov., at half past 2 o'clock, was doing duty in the neighborhood of Cuyler's Alley, and found a dead body. It had nothing on but a red flannel shirt tied around the body, and an old bolster-case tied around the head, and a white pair of drawers wrapped around them. It had a wound upon the left temple of the head. A rope was tied around the body, and another around the head. The rope around the body was slack, as if to carry it. Witness staid with the body until 2 o'clock, when the coroner came and took it away.

*Doctor Stevens sworn.*—Saw the dead body on Monday. The wound upon the left side of the head appeared to have been produced by some blunt instrument. The body had longitudinal scratches upon the chest, such as might have been produced by dragging him upon the sand or gravel. He appeared to have died in good health. Witness thinks he died in good health, from the appearances on examination. There were marks of a rupture on the right side, which the truss now produced would fit. The body might have been dead four or five days. The scalp of the deceased was not cut—the wound must therefore have been inflicted by a blunt instrument. The wound was about three inches and a half long, and two and a half wide, and it was about two inches deep—it must have produced instantaneous death.

*Doctor Rogers sworn.*—Concurs in the testimony of Dr. Stevens, in all he has said. Was present at the examination. The truss now produced would be proper for the rupture on the person of the deceased.

*Elizabeth Day*, lives 16 Barclay-street. Saw the body on Monday, 24th of Nov. at the Hospital. His name was James Murray, the same person that called at her house to inquire for the Rev. Mr. Powers. He told witness that his name was James Murray, and that if the Rev. Mr. Powers called, he would know his name. The deceased was dressed in a gray coat, dark vest with spots, black silk handkerchief, and dark pantaloons. The coat and waistcoat now produced, James Murray had on when he was at the house of witness. Witness described the clothes Murray had on, before she saw them in the police office; has no doubt at all that the body at the hospital was the deceased Murray, nor that the clothes now before the court were worn by Murray when at her house.

N<sup>W</sup> YORK,  
March, 1894.

The People  
v.  
Johnson.

*John Powers*, sworn, saw the body of the deceased on Sunday morning. His name was James Murray. Witness saw James Murray alive the Thursday before the Sunday he was exhibited at the alms house. Witness saw him at the Rev. Mr. Powers'. He had on a gray coat, dark spotted vest, and darkish pantaloons, the same now produced before the court.

*Doct. Powers*, sworn, is a physician. Saw the body of Murray on Sunday. It was the body of James Murray. The same person I saw at my brother's on Thursday. He had on a gray coat, and dark vest; did not know him by any name, but others called him Murray. Is certain it is the same person who called at his brother's.

*Samuel Morehouse, Jun.* sworn. Arrived in New York, from Boston, in the sloop *Fulton*, in Nov. last. It was on the Tuesday preceding the Sunday on which the body was exhibited. Saw a body in the rear of the hall on Sunday. It was the body of the person who came in the sloop with me from Boston. Am certain, and cannot be mistaken. Murray staid on board until Thursday. Had a chest on board—the chest now before the court. The deceased

N<sup>W</sup> YORK,  
March, 1824.

*The People*  
v.  
Johnson.

wore on board the sloop a gray coat, and red shirt and grayish pantaloons, the same now produced. Does not know his name—paid his passage—was very particular about his chest—does not recollect who came on board with him, and was not intimate with any person on board.

*Dennis Ripley*, sworn. Was mate on board the *Fulton*—saw the dead body of a man in the rear of the hall on Sunday. It was the body of the same person who came from Boston in the sloop *Fulton* with witness—saw his chest—it is the same chest now before the court. The deceased wore on board the vessel a gray coat, grayish pantaloons, black silk handkerchief, dark waistcoat. The clothes now shown to me are the same clothes the deceased wore on board the sloop.

*Henry Young*, a black man, sworn. Is steward on board the *Fulton*—saw a dead body in the rear of the hall. It was the body of the person who came from Boston on board the sloop *Fulton*. Deceased left the vessel on Thursday in the afternoon—is certain the deceased is the person who came in the sloop. The man at the bar (Johnson) and the deceased came on board and took away a chest on Thursday afternoon. Had seen Johnson speaking with Murray on Wednesday before—Murray came on board and lifted the chest on the quarter-rails, and Johnson took hold of it. Cannot tell which way they went—they took it away in their hands. —Murray had on a gray coat, dark pantaloons, and dark vest, with spots in it—the same clothes now before the court. Saw the body at the alms house—immediately recognized it. Described Johnson to the officers of the police before he was taken.

*Cross-examined.* Johnson and deceased took away the trunk one hour and a half before sun-down on Thursday. Johnson had been there the preceding Wednesday, and had conversed with Murray. Johnson was dressed the same on

Sunday he was when he and Murray went away. He had on a green surtout on Sunday. The chest now before the court is the same that belonged to Murray on board the sloop.

N<sup>W</sup> YORK,  
March, 1824.  
The People  
v.  
Johnson.

*Thomas Kip*, sworn. Is a cartman. On Thursday, in the afternoon, between one and two o'clock, was at the head of Burling slip. It was on Thursday preceding the exhibition of the dead body on Sunday. Was sitting on Griswold's stoop—saw two men carrying a chest—one was Johnson, and the other the man whom he saw dead at the hospital. They agreed with witness to ride his trunk to Johnson's house. On arriving at the house, Murray pulled out his pocket book to pay witness, but had no change. Johnson said he would pay him, and borrowed the money of a boarder and paid him. Witness cannot be mistaken—it was Johnson—he has known him five years. The deceased was dressed in a gray coatée, and black waistcoat, the same now before the court. Witness took particular notice of him—is sure he is the same man he saw with Johnson—recognized him immediately when he lay dead in the hospital.

*Mary M' Glochlin*, sworn. Lives at No. 64 Front street, directly opposite Johnson's house—remembers the Thursday evening preceding the exhibition of the dead body on Monday in the hospital—there was a light on Thursday evening in Johnson's room at half past 12 o'clock—it is an unusual thing in that house—they are in the habit of retiring to bed at 9 or ten o'clock. One of the window shutters was open—could see into the room, but not where the bed stood. Might see a person walk across the room.

*Jacob Hays*, high constable, sworn. I arrested Johnson on Sunday as he was returning from church. I told him I wished to speak to him, and as Young, the steward of the sloop *Fulton*, was coming up to us in company with Mr. Maxwell, Johnson exclaimed, "this scares me." Witness

N<sup>W</sup> YORK,  
March, 1824.

The People  
v.  
Johnson.

then had him by the hand—told him not to be frightened. Witness took him to the police office. He never said to Johnson it would be better for him to confess. Took him to see the dead body, and requested him to touch it. Was very much agitated. Brought him to the police office, where he confessed to the magistrate.

*George A. Raymond*, sworn. Went to Johnson's house with Mr. Homan, traced the blood from the room to the store, and down the stairs into the cellar—there were spots of blood on the ladder which leads into the cellar.

*Mr. Homan*, sworn. Examined Johnson's house, crawled into a hole in the cellar, it was not more than three feet wide, but ten or 12 feet long, just large enough to admit the body of a man; in the extreme end of this hole, he found a bloody sheet, and a truss. On Monday found a bundle of clothes behind the woodpile in the yard; they were very filthy, apparently just taken from the sink of the necessary—found the chest up stairs under Johnson's bed—traced the blood out of the room down the stairs into the store—turned down the bed clothes, and found the bed wet with water and blood, and fresh spots of blood appeared on the head-board.

*Azel Concklin*, sworn. Witness examined the room in which the supposed murder was committed—there was blood upon the carpet and upon the stairs. Witness found in the bar below, a chest which contained dirty clothes, a shirt covered with clots of blood, and a cravat also very bloody.

*Justice Hopson*, sworn.

*Marwell*. Have you any money in your possession found in Brooklyn?

*Witness*. I have \$380 in specie.

*Marwell*. How did you become possessed of that money?

*Price*. I object to the inquiry—it may lead to improper testimony.

*Marwell*. I shall offer nothing in evidence against the

prisoner, but what came from third persons in his presence, and was assented to by him. I wish to show the court, that after the confession was made, Johnson was asked what he had done with the money;\* that he said he gave it to his daughter; and she, upon being sent for, said she gave it to her brother; and on his being sent for, said he had secreted it in the sand hills back of Brooklyn; and this being said in Johnson's presence, he requested his son to go with the officers for it, where it was found.

N<sup>W</sup> YORK,  
March, 1824.

The People  
v.  
Johnson.

*Price.* It must appear by the examination.

*By the Court.* Was it at the time of the examination?

*Maxwell.* It was connected with it—it was subsequent; and read 1 Hawk. P. Cp. 1. 20. to prove he might introduce the testimony.

*Price.* I contend that it was part of the examination, and could not be separated from it.

*By the Court.* We are not sufficiently certain whether the proof now proposed to be offered is connected with the examination or not. If it was made at the time of the examination, it should have been inserted. The rule of law is well settled, that the examination must be taken together. It is the right of the prisoner to demand that the whole of his confession be taken together. The evidence was excluded, and the district attorney confined to the examination, which did not contain the facts in relation to the secretion and finding the money at Brooklyn.

Doctor *Graham* objected to the reading the examination of the prisoner, on the ground that it did not state that

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\* The next day in the police office, to Justice Hopson.

N<sup>W</sup> YORK, the magistrate had apprized him that he was entitled to counsel.  
March, 1824.


The People  
v.  
Johnson.

The court decided, that no law in this country required the presence of counsel at the examination of a prisoner.

Mr. Price then contended that the confession was not *free* and *voluntary*. The prisoner was taken out of his cell to the hospital by Mr. Hays, the high constable, and was required to touch the dead body; a circumstance calculated to agitate and distract him. It was (he contended) a species of mental torture more powerful than promises of favour or threats and menaces. The law was well settled, that the least undue influence exercised upon the mind of the prisoner by threats or promises would vitiate any confession made by him. Should not then a confession made under circumstances so well calculated to agitate and confound the prisoner, be rejected?

*By the Court.* The prisoner was taken to see the dead body, and was required to touch it. He did so, and was brought by the police officer to the police office in great perturbation of mind, and confessed the murder. It does not appear that any threats or promises were made to him by the officer, or by any other person. On the contrary, it was stated to him by Mr. Hopson, the examining magistrate, that he was not bound to confess, and that his confession might be used against him upon his trial. He did confess, and that confession, in our opinion, was free and voluntary. His being taken to the dead body, and being required to touch it, does not affect the examination. What influence would such a circumstance have upon an innocent person? None. The guilty might be intimidated, and tremble; conscious innocence would disregard it.

*Mr. Maxwell* then read the examinations of the prisoner. In the first examination he denied all the facts in relation to Murray. In the second he confessed as follows:

NEW YORK,  
March, 1894.  
  
The People  
v.  
Johnson.

*City of New York, ss.*

"John Johnson again brought out and examined in relation to the murder of James Murray. Johnson was first told that he was to be examined, and that what he might say would be made use of against him, and in all probability it might cause his life; that he need not answer any question without he pleased.

*Ques.* Do you know James Murray, whose corpse you have just been to see?

*Ans.* Yes, yes, I do know him, and I will tell you all about it.

*Ques.* Where did you first meet with him?

*Ans.* On Thursday last, I met with him at the coffee-house-slip, and he asked me whether I was an Irishman, and I told him that I was born there; and he mentioned about his going to New Orleans or Savannah; and I asked him to my house, as there were a couple of men at my house who were going there, and he came and talked to Jackson and Jerry about the southward: and he stated he would stay there a few days, and wanted me to go with him and get his chest, and went and got the chest—which chest is now here shown to him from the vessel at Burling-slip; and at the head of the slip, had it put on a cart, and taken to the house, and Jackson and Jerry were there when they came with it. I paid the cartage, as I got a shilling from Jerry to make the change. The chest was put into the back room.

NEW YORK.  
March, 1824.

The People  
v.  
Johnson.

They all remained at home, and eat supper, viz. Jackson, Jerry, Mary, my daughter, Murray, the dead man, and myself. After supper, Murray and myself went over to the north river to look for the vessel that I expected my wife to come down in from Newburgh, at Washington market. We parted—Murray having stopped with a man, and I went home, and got home a little before Murray did. Jackson and Jerry were sitting there when I returned, and they saw Murray return; after which they sat and talked together till 10 or 11 o'clock, when Jackson and Jerry went up to bed in the back room, leaving the man, Murray, myself and daughter in the room: my three boys being put to bed some time previous. Murray said that he did not like to go up stairs with the men without his chest being taken up, as he had money in the chest. He did not mention the sum, but said he had enough to take him to the southward. I then proposed to him to go to bed with myself and take the chest up in the room; Mary by this time had gone up to bed in the bed-room. Murray and myself then took up his chest into my bed-room, the front room, and set it near the fire-place by the bed-side, and Murray undressed himself and went to bed, and I remained up, went down stairs, and set by the stove for near an hour, as I judge, and found Murray was asleep, and took a key out of his vest pocket, opened his chest, and took out a little bag of money about as big as my two fists. It was dollars, as I judged, as I did not open it, and Murray told me that he had silver dollars. It then came into my head to murder him, and I threw the bag and money into the corner of the closet where there were carpenter's tools. I then went down stairs and got a hatchet, and came up and struck Murray two blows, as I think, on the head, and he never

moved as I know of: I then put something about his head so as to prevent the blood running on the floor, and carried him down stairs into the cellar through the trap door. I then returned up stairs, took the bloody pillow and the hatchet, and went and threw them into the river. When I returned I looked about the floor for the blood, and not seeing any, went and laid down on the bed with Mary, being afraid to go into my own bed. In the morning I felt very uneasy, and my daughter Mary asked me what the matter was, and I finally took her and told her how that I had killed the man, and showed her where I had put him, and he remained there till 10 o'clock the next night: when they were all quiet, then I put a rope about the man, and carried him out and left him in the lane. I can't say what has become of the money, the clothing, or any thing else of the man. Mary cried and went on when I told her, and she said it would not have happened if her mother had been at home. I put the bloody sheet and things all into the river."

NEW YORK  
March, 1894

The People,  
v.  
Johnson.

JOHN JOHNSON.

*Taken the 25th of Nov. 1823.*

J. HOPSON.

Doctor *Graham* commenced summing up. He contended this was a case depending entirely upon circumstantial evidence: the examination must be thrown aside. It was taken under circumstances of extreme perturbation in the prisoner. He had not the benefit of counsel—had just been to see the dead body—had touched it. In this situation he is brought to the police office—ready to confess any thing, and willing to confess every thing

NEW YORK,  
March, 1824.

The People  
v.  
Johnson.

to save his family. The examination therefore could not be depended upon. The counsel read the celebrated Vermont case, where the party had confessed himself guilty of murder, and the man was discovered to be alive, just before the day appointed for the execution. And to show the dangerous tendency of presumptive evidence, the Doctor read a number of cases in the appendix to Phillips.

*Price.* Gentlemen, we have a great responsibility upon us—we are to pass upon the life and death of a fellow being—we are called to take away the life of a fellow being. Need I remind you with what care and caution you ought to proceed. I advert to it to admonish you, that unless you have the most satisfactory evidence of the prisoner's guilt, for your own peace here, and for your security hereafter, you will not take away this man's life without the most satisfactory evidence. It has been doubted by many great men whether it could in any case be taken by the creature, it being the gift of the Creator.

The counsel adverted to the fact of Johnson's former good character, and contended it was against the nature of things for a man to plunge into the depth of wickedness at once—he proceeds by degrees. And argued the improbability of the guilt of the prisoner, from the enormity of the crime.

He contended, independent of the examination, there was not sufficient evidence to convict. Little reliance could be placed on the examination—it was no doubt made under the most excruciating agony of feeling—made to save his family—made after his return from laying his hand upon the dead body of the man charged to have been murdered. He referred to the Vermont case—it was no bug-bear, no man ever doubted it.

The counsel then attempted to show a discrepancy between the testimony of Young, the steward, and Mr. Kip. He also remarked upon the favorable circumstance of the window shutters being open, and concluded no man in his senses would commit so foul a crime with the window open. He also remarked upon the expression used by Johnson, while in the custody of Mr. Hays, at the approach of the steward—"It scares me."

N<sup>W</sup> YORK,  
March, 1824.  
The People  
v.  
Johnson.

The word guilty is easy pronounced, but its effects are irrevocable; for let it not be whispered to you that if you pronounce him guilty, there is aught can save him from execution. No, gentlemen; I say, if he has been guilty of the murder imputed, he has committed a deed of deep, bloody, and unprovoked malice, meriting all punishment. If he be guilty, gentlemen, he has by this one act contradicted a life of excellence. You have heard from witnesses you cannot discredit that his past life has been without reproach. It is not in the course of nature thus suddenly to plunge into guilt; it is the work of time, and no man ever was at the outset an accomplished villain. This man had every inducement to be otherwise—a good character, acquired through a long life; in possession of large means, with a wife and children around him. Would he have thrown from him all these blessings, his peace here and his hopes hereafter, for the indulgence, at such hazard, of the passion of avarice? It is almost incredible. The counsel then went on to comment on the evidence, laying particular stress on the fact that the two men, Jackson and Jerry, said to have been in Johnson's house at the same time with the deceased, have not been called; no account has been given of them; no assurance that, reckless villains as they may be, they have

N'W YORK,  
March, 1824.

—  
The People.  
v.  
Johnson.

not fled with the consciousness of guilt from the possibility of punishment. If the proof were irresistible, which it is not, that the deceased was murdered in the prisoner's house, it would by no means follow that the prisoner was the murderer. Then as to identity, it is one of the most difficult cases in the world to establish, and in a famous case from Haverstraw, tried in our old city hall, was demonstrated. Yet, to the identity of Johnson as being alongside the sloop on Wednesday, we have no positive evidence but that of the steward, though the captain, mate and working people around them, had no recollection of seeing him. He had never seen the prisoner before, never spoken to him, yet he identifies him, and not only identifies his person, but his clothes, and not only his clothes when without, but when covered with a surtout. The witness, I hope, believed that he stated,—but if he did, it only shows you, gentlemen, what a witness may state as a fact, what the jury would find it difficult to receive as such.

But the prisoner has confessed, it is said: confessions freely made are the highest evidence—but under threat or hope, or under any undue excitement, ought never to be received. But what was his condition? Torn from his family on a Sabbath day, thrust into a loathsome prison, his wife cast into the same prison—his daughter, just entering into life, incarcerated there too—his little boys scattered, God only knows where. After passing two nights, thus harrowed in heart and spirit, he is taken to the hospital, to gratify some absurd theory, to see if by his touch, the dead body will not bleed afresh! Thus harrowed, thus tortured, he is carried to the police office, and there falling on his knees, says he will confess all, confess every thing. And this is called free and volun-

tary confession ! A promise of reward, however trifling, will vitiate any confession, and yet this mighty working on the mind is to be held as not affecting this case. I do not refer to the Vermont case as a bug-bear, but put it solemnly before you as an instance in which a man confessed himself guilty of murder, when none had been committed. Here murder has been committed, but the confession is possibly not less false. Here I commit this cause, gentlemen, to you. I ask no perjured verdict at your hands—but, as you are accountable beings, if you entertain a doubt, I invoke the benefit of it on the side of mercy and human life.

N<sup>W</sup> YORK,  
March, 1824.

The People  
v.  
Johnson.

*Maxwell* commenced by observing, if ever there was a case where the evidence was of that conclusive nature that left no doubt in favour of the accused, this was one. He had never known a case where all the circumstances so harmonized. It might be true that innocent men had suffered ; but because it is possible, and may at some time or other have occurred, is John Johnson to embroe his hand in the blood of a stranger with impunity ? Is Johnson to be thought innocent, because an innocent man *may* have suffered ?

He then remarked, the jury were bound to judge the case according to law—that the throne of mercy was not in this hall. Here we are bound by the principles of law, and in accordance to them we must decide. The executive may pardon, if the object is thought worthy the exercise of this power.

He then remarked upon the evidence : there was a singular consistency in the testimony of all the witnesses. The testimony of Young, the steward of the sloop, must be

N<sup>W</sup> YORK, satisfactory as to the identity of the prisoner—his calling  
March, 1894. at the sloop on Wednesday and Thursday, and what took  
The People place on Sunday, when Johnson was arrested.

V.

Johnson.

He replied to *Mr. Price's* remarks upon *Young's* testimony, and upon the fact that the window shutter of Johnson's bed room was open on the night of the murder. He observed that Mrs. Johnson had gone to Newburgh, and might have left it open, or that perhaps the deceased, being a stranger, and wanting to rise early in the morning, had opened it himself.

He observed the confession was perfectly free and voluntary. The magistrate testified that he had given him all and more than the necessary caution. The magistrate indeed had to restrain him; to such an extent had a guilty mind been operated upon, by a consciousness of its own crimes. The fact of the prisoner's being taken to, and touching the dead body, could not be used as an argument against the validity of the examination. If he was an innocent man what had he to fear. He made the confession just read without any advantage being taken of his situation; he did not even know his wife and daughter were in gaol. You, gentlemen, are called here under the solemnity of your oaths, to do justice according to law and evidence; and if those laws and evidence, with your oaths, require, that for a particular crime life shall be forfeited, you must go straight on. You are not here to legislate—not to exercise the prerogative of mercy, but to find a verdict on the facts detailed before you. (The district attorney here commented upon the arguments used by the prisoner's counsel; and then adverted to as a fact that could not be explained, but to the disadvantage of the prisoner, that his counsel had not

called to exculpate him, if he could be exculpated, his daughter, the witness, of all others, that could best establish his innocence.) For the prosecution this witness could not have been introduced, without violating the feelings which belong to us all ; but in *defence* of a father, her filial affection, her highest obligation would have prompted her at once to appear as her father's vindicator ; it is happy this daughter was not introduced ; it would have led to a scene which we should never have forgotten. As to the effort to invalidate the testimony of the coloured man, because he and Kip differ as to time ; and again because he had said he could identify the clothes, though prisoner wore a surtout, the district attorney had examined and refuted them.

N<sup>W</sup> YORK,  
March, 1824.

The People  
v.  
Johnson.

Mr. Maxwell here went into a particular detail of the evidence, and concluded by remarking, that if the jurors of our country were to disregard testimony of such a character as that now before the court, there was no safety for the lives of individuals. If strangers coming into our city are to be inveigled into houses, apparently for their accommodation ; and when in the house, where they suppose themselves entitled to protection, to be robbed and murdered, there could be no security for life or property.\*

CHARGE OF THE COURT.

EDWARDS, J. Gentlemen of the Jury—The high and responsible duty now to be exercised by you, is the most sacred and awful that a fellow citizen can

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\*It is not pretended that I have given even an outline of the gentlemen's speeches—they were much admired. I have condensed the testimony of witnesses, and the speeches of counsel, in this memorable case, as much as possible.

N<sup>W</sup> YORK,  
March, 1824.

The People  
v.  
Johnson.

be compelled to perform. It is a duty of the greatest importance to society, and which is necessary to be exercised for their protection and safety. You must be so impressed with this feeling as to make it unnecessary for me to remark any farther upon it. You are called to pass upon the life of a fellow being. You must decide between the people of the state of New York and John Johnson, the prisoner at the bar. You are called upon to pass according to the evidence before you, divested of any thing you may have heard out of doors.

His Hon. then detailed the evidence to the jury. On Saturday the 23d of November, a man was found in Cuyler's Alley, by Mr. Miller, the watchman; the situation and circumstances of the body were such as to induce a well-grounded belief the man had been murdered. The particular state of the body and circumstances of it (here the judge stated the particulars of the evidence.)—The body was watched by Mr. Miller until the Coroner was sent for, when it was removed to the hospital, where it was seen by Mrs. Day, Young the steward, and others—they recognized the body to be James Murray, who had just arrived in the sloop Fulton, from Boston, and was at the sloop on Thursday in good health. It is certain he was murdered: the next inquiry is, who is the murderer? It appears by the testimony of Young, the steward, that Johnson came to the sloop on Wednesday and talked to Murray, and came again on Thursday, and he and Murray took away the trunk of the latter. It also appears that Mr. Kip carried the trunk to Johnson's house, which was the last place the deceased was seen at alive. (Here his honor stated the testimony in relation to the bloody clothes found in the house, the clothing found behind the

wood pile, and the testimony of Mr. Homan and others, (N<sup>W</sup> YORK, police officers.) March, 1824.

It is your duty, gentlemen, in a case of this kind, to make every reasonable allowance, and put upon the transactions, as they have been disclosed, the most favourable constructions that can in any way benefit the prisoner. It is your duty in considering the case, to test the witnesses, to test their accuracy, to give every circumstance in favour of the prisoner as much weight as in your judgment it ought to receive. In order to the clear understanding of this case, I will read to you the first examination at the police office. (Here the judge read the first examination of the prisoner, commenting upon, and explaining it to the jury.)—With respect to the last examination, the law is, that if it was made under any threats or promises whatever, it cannot be received in evidence. In this examination it does not appear that any threat or hopes were held out to the prisoner. But, however, should you think that he made this confession under any frenzy of mind, from the effects of guilt, and anguish, and sufferings which he could no longer endure, then it is admissible in evidence against the prisoner, and is entitled to full credit.

The People  
v.  
Johnson.

I do not know that it is my duty, or that it is necessary for me to enter more fully into the testimony.

In the close of my remarks, I shall observe, that on the one hand you have the life of a fellow being in your hands, and on the other you have a community to protect. Your course must necessarily be straight forward. You cannot turn either to the right or to the left, without doing great injustice to the prisoner, on the one hand, and to the community, on the other. You will, when you retire from these benches, take the subject into your

NEW YORK, consideration, and report the matters as you find them, March, 1824. under all the circumstances of the case.

The People  
v.  
Johnson.

With respect to mercy, gentlemen, this is not the mercy-seat. That attribute is in the hands of the executive. If he is a proper subject for mercy, it rests with the executive to extend it. Your duty, gentlemen, is to say whether the prisoner at the bar is or not guilty of the murder laid to his charge. With these remarks, gentlemen, I submit the case to your consideration.

The jury then retired, and in about ten minutes, viz: at a quarter after two o'clock in the morning, returned with a verdict of GUILTY. He was executed.

## OVER AND TERMINER.

NEW YORK, MARCH, 1824.

The dying declarations of a party murdered may be given in evidence when made under a full belief that he will not survive.

Perhaps they may be receiv'd when there is a faint and lingering hope of recovery by the sufferer.

(See note p. 398.) A. was stabbed with a dagger in the evening, and the next morning (he being very low and could hardly speak) his affidavit was taken, wherein he stated, that B. stabbed him. He was then taken to the hospital, and died in nine days. It was held the affidavit could not be read as the dying declaration of A. no evidence being offered that induced a belief that he was mortally certain he would not survive. The Court, and not the jury, are to decide upon the admissibility of dying declarations.

The People  
v.  
James Anderson.

MURDER.

Present—Hon. Ogden Edwards, Cir. Judge,  
Hon. Richard Riker, Recorder,  
Aldermen King, Parker and  
Doughty,

Justices  
of O. & T.

Maxwell, District Attorney, Counsel for the people.

J. W. Wyman and Francis A. Blake, Esqrs., Counsel for the prisoner.

The following persons were called and sworn as a petit jury:—Benjamin Armitage, James De Forrest, John

Downs, James L. Bleecker, Henry Westervelt, Martin Haverstraw, Joseph Harrington, Elias R. Rabbit, Samuel Norswothy, Charles Potsley, Lewis Van Antwerp, Benjamin Stagg.

NEW YORK,  
March, 1894.

The People  
v.  
Anderson.

*Mr. Maxwell* opened the case to the jury. Gentlemen—The prisoner is indicted for the crime of murder, and I am apprehensive that the testimony will be of such a character as to put beyond a reasonable doubt his guilt of this felony. The circumstances attending it were deliberate, cool and calculating on the part of the prisoner, to deprive the deceased of his life. He is indicted for the murder of James Brister, a coloured man who kept an oyster stand in the Bowery, against whom he was at enmity, on account of an intimacy which he suspected existed between the deceased and his wife. On the 28th of October, in the evening, the deceased was passing along the Bowery, when he heard some person behind cry out, "Brister, Brister," and in a moment he felt the thrust of a dagger or a knife in the left side of the breast, which occasioned his death. The prisoner attempted to repeat the blow; the deceased fled, pursued by the prisoner. The unfortunate man having received this wound went to the place where he lived. Dr. Frumel was immediately sent for—he attended the man at the time; he was in the greatest agitation, and was under the full expectation the wound would occasion his death. At that time he stated the name of the man who had given him the wound, and continued to repeat the declaration that Anderson was the man, both at home and at the police office.

Anderson was arrested on the following day. He denied that he had been in the Bowery, and that he had given the wound to the deceased. Search was however

N<sup>W</sup> YORK,  
March, 1824.

The People  
v.  
Anderson.

made at Anderson's house, and in the bed was found, under the pillow, a dagger, which I now produce before you, and with which the wound must have been inflicted. These, gentlemen, are the circumstances of the case.— If you shall believe that the prisoner at the bar is the party who inflicted the wound—if you shall believe that he had the malice which is either expressed or implied by the law, and if you shall believe that Brister died of the wound, then, gentlemen, you can have no difficulty at all. But it is my duty, gentlemen, to direct the attention of the court and jury to the proper principles of the law, by which the distinction between murder and manslaughter is broadly and distinctly drawn. (Here the prosecutor read from 1 East. P. C. 214. 224. 234. approved authorities of criminal law, the usual definition of murder, the testimony necessary to constitute it, and the distinctions between murder and manslaughter, &c.) I have now, gentlemen, read to you the law to which I wish you to direct your attention. You, gentlemen, are constituted by the law, the judges as well of that law as of the fact. For the present I shall content myself with the statement I have made of the law and of the fact, and will produce to you the testimony, to which I invite your consideration.

#### EVIDENCE.

*Doctor Marinus Willett, Jun.* was the first witness sworn. He is a surgeon in the hospital. The wounded body of the deceased was brought to the hospital on the 30th of September, 1823, and died on the 9th of October. He described the wound, which was on the left side; the dagger passed through the skin, passed through the membranes round the heart, grazed the lower part of the heart, and terminated in the liver, and corresponded with the instrument now in Court, which is the same with which he measured the wound at the time. That wound was enough to have produced his death. That wound was the cause of his death.

*Cross-examined.* An inflammation of the membranes of the heart may arise from other causes; but in this instance it was caused by the wound. Could not perceive how a fall should have produced such an inflammation. There was evidence of great disease about the liver, which might ultimately have killed him.

*William Suttiff* testified that he is a city watchman. The prisoner at the bar was brought into the watch-house, about the last of September, by another watchman, and witness brought him down to the police. The key [now in Court] was found on the prisoner. Witness went to prisoner's house in Orange-street, and found a bed and a chest. The key unlocked the chest. When the prisoner was in his custody, he denied having stabbed the deceased, or knowing any thing about him.

*John Trenchard* testified, that he is one of the city watch, and arrested the prisoner in Orange-street, in a house where he was found in bed. A dagger (the same now in Court) was found under his bed, alongside of the chest which the key fitted. The bed lay on the floor. When arrested, witness denied having stabbed deceased. He took him to the house of the man who was stabbed, where prisoner asked Brister what he was going to send him to prison for? Brister replied, "because you have stabbed me with a dagger." Prisoner replied, "Do you say I stabbed you?" "Yes," said the deceased, "you are the identical man, and I will take my oath of it." [Blake objected to this testimony, as being an indirect way of availing himself of the assertions of the deceased. Maxwell said he was only showing the conversation between prisoner and deceased.] The dagger was concealed under the head of the bed on which he lay. The dagger now in Court is the same—saw no blood on it then.

*Cross-examined.* When he arrived at the house of the deceased, he appeared to be badly wounded. He spoke feebly—and it was supposed that his wound was mortal. When he charged the deed on the prisoner, he did so without anger, and with great mildness. Prisoner was cross and angry. Suttiff found the dagger.

*Suttiff*, called again.—He found the dagger in the sheath; the same as now in court; there were spots on it, which he thought were made by blood.

*Michael Riley* (black).—The deceased lived in the house with him. He has known the prisoner for some time, and a quarrel had existed between prisoner and deceased for about eighteen months. Prisoner told witness, in Pearl-street, about eighteen months ago, that he meant to have satisfaction out of Brister, and then he did not care what became of him. The quarrel was in relation to some woman. Prisoner told witness that he thought Brister kept his wife. Witness was not at home when deceased was wounded—heard of it in about half an hour, when he saw deceased. Witness had informed deceased of prisoner's threat. Had known the deceased two or three years, and the prisoner eight or nine years.

*Cross-examined.*—Witness had never been treated ill by the prisoner, but his character was bad. He used to abuse his family, and beat his wife. He has a bad temper. Has had no quarrel with him, and is his friend.

N<sup>W</sup> YORK,  
March, 1834.

The People  
v.  
Anderson.

N<sup>W</sup> YORK.  
March, 1824.

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The People  
v.  
Anderson.

*Smith Orutt* (Police Justice,) testified, that he went to the house of the prisoner on the evening after the man was stabbed, and was present when the dagger was found under the head of the bed, which was against the chest which was opened by the key *Sutliff* had taken from the prisoner. The key and dagger are the same, and have been kept in the police office. He took the key from *Sutliff*, who took it from prisoner in *Bridewell*.

*Sutliff*, called again.—He saw prisoner unlock the chest with that key.

*James Hopson*, Police Magistrate.—The examination [produced now by *Maxwell*] was taken by witness, after cautioning prisoner, and advising him to send for counsel, which he did. Witness told him he need not confess any thing unless he chose to do so. [Witness always gives this caution in important cases.] The examination was taken on the 10th day of October, the day after *Brister* died. [The examination was then read.] From this document it appeared that the prisoner is a native of Africa—was brought to *St. Domingo* when young—was a young man when the troubles broke out. Acknowledged the chest, key, bed and dagger—had kept the dagger among the rubbish in his chest—took it out on the Sunday before the affair—put it under his bed on the night in which *Brister* was stabbed—had had a quarrel with *Brister* about his wife. On the evening on which *Brister* was stabbed, prisoner met him walking arm-in-arm with his wife. They came out of a cellar together—as prisoner approached, his wife shoved deceased off—he went to the side of the street, took up a brick-bat, and made as though he would throw it at him. Prisoner did no more than to defend himself.

*Riley*, called again.—Produced the bloody clothes which deceased had on when he was stabbed. [The hole in the vest corresponded with the size of the dagger, and the place of the wound.] [*Maxwell* was proceeding to examine him as to the declarations of the deceased. *Blake* objected, and read from *Phillips' Evidence*, p. 200., and *Pleas of the Crown*, 1st East, p. 353., to show that the declarations of a person deceased are not to be taken in testimony, unless the wounded person is fully aware of his situation, and probable and speedy death. *Maxwell* referred to *Radburn's case*, 1st *Leach's Crown Law*, p. 458., which he contended at once did away all difficulty. In this case, the wound was inflicted on the 29th of May, and she (*Hannah Morgan*) went to the public officer on the 8th of June, and gave information, &c. and died in July; and when her testimony was taken, it did not appear as though she was a dying woman. On the trial of the perpetrator, the same objection was taken, as is now raised, but was overruled by the Judge. The question was carried up, and the decision of the Judge was confirmed by the whole eleven Judges—*Lord Mansfield* being absent.] The examination was continued. Witness watched with deceased that night, and deceased, while in bed, told him that he did not think he should ever recover. Complained of being in much pain, and spoke as though he expected he should not recover; and when he got to the hospital, he told witness (three days after) that he was certain he should not now recover. [*Blake* again objected to putting the question respecting the declaration of the de-

ceased, as to the person who had stabbed him, and argued the point. Maxwell replied, and dwelt upon various authorities, which he quoted. Blake replied, and Maxwell rejoined. Wyman observed, that as it was an important question, which does not appear to have been decided in this country, he thought the Court should reserve the point, that they might avail themselves of the benefit of it, hereafter. The Court decided, that the declaration of the deceased, after he had told the witness that he could not recover, must be received as proper testimony.] The examination proceeded. When at the hospital about three days after the deceased was stabbed, he said he should die, and he laid his death to the wound. And he told witness before he went to the hospital, and afterwards, after the above declaration, that he was stabbed by James Anderson, the prisoner at the bar. He always told the same story, and was positive. When asked if he was trying to do any thing for himself, he said—"Yes: he was trying to make his peace."

*Cross-examined.*—Has heard deceased say, that if Anderson interfered with him, he would flog him. [An abortive attempt was made to set aside the testimony of this witness, on the ground that he was born in Virginia, and that all blacks are there born slaves: and consequently the presumption is, that he is a slave. Witness testified that he was born free—never was a slave. Maxwell denied that all blacks were born slaves in Virginia, but he hoped that we were not trying this case by the laws of Virginia. The Court overruled the objection.]

*Mr. Overt*, called again; took the affidavit of deceased, on the morning after he was stabbed, which was the 29th of September, Spoke low and feeble—said he thought the dagger penetrated the back-bone.

*Maxwell* now moved to read the affidavit of the deceased. The testimony of Riley shows that deceased was apprehensive that he should not live, the night before.

*Overt* called again by the Court.—Deceased was formally sworn, and appeared perfectly calm, collected, and in his right mind.

*Riley* examined again as to the situation of his mind. Perfectly calm, and in the possession of all his senses.

*Trenchard* testified to the same.

*Mr. Stevens*, (Clerk of the Police,) testified that he accompanied *Mr. Overt* to take the deposition. Witness wrote down the deposition, and read it over to the deceased, who was calm and collected, and in his right mind. Thinks the deceased spoke of the wound as a mortal one, but does not recollect the words used.

Here the case for the prosecution was rested.

*Mr. Wyman* for the prisoner, opened the defence, and contended, generally, that the Attorney for the prosecution had failed in sustaining the indictment. The testimony which he had introduced was circumstantial and inconclusive. But in order not only to make the innocence of the prisoner highly probable, and indeed morally certain, his counsel would be able to satisfy the jury that he has hitherto sustained a fair and good character; that his conduct has been very correct, as will be testified by a number of persons who have been acquainted with him for some years. I do not, said *Mr. W.* know that we can produce any evidence as to what has

N<sup>W</sup> YORK,  
March, 1821.

The People  
v.  
Anderson.

**N<sup>W</sup> YORK,** been proved by the witnesses for the prosecution. But it will appear that at seven o'clock he was in the house of one of his friends, whence he went to the house of another, by whom he was accompanied to that of a third. At ten o'clock he went home and went to bed; and the inhabitants of the house saw nothing more than usual in his deportment. We will now submit to you gentleman, to see whether or not the prisoner is guilty. The Court will lay down the law to you, and you will then be enabled to judge both of the law and the fact.

**March, 1824.**  
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The People
 v.
Anderson.

Mr. Suttiff was called again, and thinks the dirk, as it now appears in Court, looks exactly as it did when it was found.

William Taylor (black)—heard of this unfortunate affair next morning. In the first place, prisoner came to his house about seven o'clock the night before—returned again about 8, and went away about 9; clock struck just as he went away. Lives at No. 1 Spruce-street—said he would go home and go to bed. Has known prisoner 10 or 12 years. All he ever saw of him, believes he is an honest man, and of good principles.

William Gordon, (black)—heard of the affair next morning—was at Taylor's that night, and went out when the clock struck 9, and walked into Chatham street—stopped some time—talked at the gate; prisoner wanted witness to go home with him—did not go with him, as it would be out of his way. Prisoner then said he would go home and go to bed. Witness went back to Taylor's; from thence went home, when it was near 10 o'clock. Prisoner was lame: there had been a corn on his toe which he had cut, and it prevented his walking.

Cross-examined by Maxwell. Is a married man, and lives at No. 9 Warren-street. Had been at prisoner's house in Orange-street. Prisoner wanted witness to go to Church with him. Prisoner said nothing about Brister that night. About a week before, prisoner told him that he had put Brister in prison once, on account of his wife, and he intended to pay no more attention to him. The first he ever heard of the intimacy between Brister and Anderson's wife, was at the door of Anderson's house, about two or three months before this affair. Brister came up to Anderson's door—Anderson ordered him away—Brister laughed at prisoner—mocked him about his wife; and said he would slam him to pieces. Had been at prisoner's house in Orange-street but once—prisoner had a dagger, which he said Gen. Yates gave him. He kept it under his bed—sometimes sticking up in his house. Never heard him threaten to use it, but said he would have satisfaction of him by law. This was when prisoner found his wife in deceased's apartment, pretty near a year since. Has heard deceased boast of his intimacy with prisoner's wife. Prisoner is a fine hearted man, yet rash and quick, but can be easily calmed. Brister pretended to be a religious man.

Ann Bings, (coloured woman,) with whom prisoner boarded. He came home a little past 10 o'clock, and went to bed. She saw nothing unusual in his appearance. He was not intoxicated, though in the habit of being so. When the watchmen came, she went up stairs with them; this was about three quarters of an hour after he came home. Never heard him speak of a dagger, nor did she know that he kept one. He had told her that he was a married man, but

did not live with his wife, because she was dissatisfied with him.— N^W YORK, Has seen him quarrel with his wife, and strike her. Is a quick tempered and violent man, when in a passion. March, 1824.

Thomas Chatterton. Had known the prisoner for four or five years, as a boot black in his neighbourhood. He was considered a civil, industrious man. Never had heard any thing against him. The People v. Anderson.

Dr. Francis U. Johnson. Knows the prisoner, who served him about 18 months, in 1821 and 1822, as a servant; he was a faithful, honest, and good one. Has not known him since, but then considered him an honest man. Saw no bad temper: on the contrary, he was good natured and obliging.

Leonard Rodgers.—had known the prisoner for 10 years, and as far as he knew, he was an honest, good kind of a man. Prisoner had followed the sea a good deal—had often bought goods of him; and when he trusted him, he would always come and pay him when he returned. He had made a good deal of money at one time and another, and formerly had put money into his hands to keep for him.

Isaac Babbitt—had known the prisoner five or six years, and his character as far as he knew, was very good. Witness was a clerk to Mr. Rodgers during the time mentioned in the testimony of Mr. R.

Isaac Kipp—had known the prisoner five or six years, as an honest, industrious man. Prisoner's shop had been nearly opposite to witness's residence. Never heard of any of his violence, except something about his wife.

Mr. Wyman remarked, that they had many witnesses subpoenaed to testify to the same point, who (on calling,) did not appear to be in court. He had heard, however, that Mr. Maxwell, (the prosecuting Attorney,) had known the prisoner, and, if that gentleman had no objection, he would request him to be sworn. Mr. M. said he had no objection, and

Hugh Maxwell, Esq. was sworn.—He had known the prisoner some five years since, and employed him as a boot-black—he then bore the character of a sober, honest, industrious man.

Dr. Willett was called again, to examine the rent in the vest. The vest was put on by the witness, (Riley,) and the doctor examined the situation of the hole; he said it must have been pretty nigh the spot where the deceased was stabbed.

By THE COURT.—We think the deceased was pretty well convinced when he came into the hospital, that he should not recover. Within one or two days of his decease, he was informed that his case was hopeless, but he was in great distress, and probably not in his right mind. His sufferings were very great. His impression is, that deceased told him he had been stabbed, but is not certain. His mind good, and he was perfectly himself for five or six days after he arrived at the hospital. He was spoken to about being prepared to

N^W YORK,
March, 1824.

The People
v.
Anderson.

render his final account, and he listened with some attention. It is the impression that deceased did mention the name of the person who stabbed him, but does not recollect it. He did not question him particularly. He does not think that deceased apprehended death so much from his sufferings, at first, as from the knowledge of the depth of the wound.

Riley, called again. The deceased was a younger, and a stronger man than the prisoner.

John N. Adriance—testified to the good character of the prisoner for five or six years. Never knew but that his disposition was mild. Appeared to show a great deal of affection for his wife.

Thomas Carpenter—lives in the neighbourhood, and confirmed the above—never saw any thing as to the trouble with his wife, although he had heard of it.

Elisha Morrill—knew the prisoner as much as eight or ten years ago, in Nassau-street, and confirmed his good character.

Noah Wetmore, Superintendent of the Hospital. The deceased was admitted, like others, into the hospital. Witness visited him as he did other patients. The case was a critical one; but witness does not recollect that deceased was particularly apprehensive about his situation.

The counsel for the prisoner here rested his defence; and

MAXWELL then renewed his application to read the affidavit of the deceased. And, after considerable deliberation,

THE COURT delivered its opinion at length, and went into a close examination of the testimony bearing upon this point.

Edwards J. There can be no doubt as to the law upon this subject, where the testimony of the deceased is taken under a strong belief that his case is hopeless, and that he is soon to appear before his Maker; nor should it be excluded in all cases, where there was a faint and lingering hope of a recovery.* But in the present case, the deposi-

*1. It has been repeatedly decided that the dying declarations of a person mortally wounded, who is conscious of approaching dissolution, are to be received, whether he expresses his belief that he will survive or not. 2 Leach, 563. 1 East. P. C. 353. 1 Chit. C. L. p. 464. The situation of the deceased may be such after a wound given, as to incapacitate him for conversation to the extent necessary to express his belief of his situation, and yet upon being interrogated may designate by name the person who caused his death: his consciousness of approaching death may be

tion of the deceased was taken the day following the infliction of the wound ; but the Court could find no positive testimony that the deceased was morally certain that he could not survive, until the time of his declaration to the witness, (Riley,) three days afterwards. And if he was previously convinced that there was no chance of his recovery, it is certainly very strange that he had not said so, especially to his most intimate friends. It is a settled principle, that in all cases involving the life of a human being, every doubtful point is to be construed in favor of the accused. In the administration of the justice of the country, the law imposes the same duty upon both judge and jury ; and where the matter of fact is at all doubtful, both court and jury should lean to the side of mercy. The Court have kept this question suspended for several hours, and after due advisement, the learned Judge remarked, that they could not take it upon them to say, that when the affidavit in question was taken, the deceased rested under that firm expectation of speedy death, as to warrant the receiving of his declarations as the testimony of a dying man. The affidavit, therefore, cannot be received. But the declarations of the deceased after the declaration to

N^W YORK,
March, 1824.

The People
v.
Anderson.

gathered from the *wound* and from the *illness* of the party. Ibid. Swift's Ev. p. 124. 6 St. Tr. 195. 201.

2. No principle of law is better settled, than that, where it appears the party was not conscious of his approaching dissolution, although he might be actually dying when the declarations were made, they cannot be received in evidence. Woodcock's case, Leach, 563. and Radburn's case, p. 364.

3. In all cases whether the deceased was conscious of approaching death at the time the declarations were made, is a fact to be decided by the Court, and is not to be left to the jury. 1 East. P. C. 353 2 Leach, 360. 563. But see Woodcock's case, Leach, 563. McNally's Ev. 263 264.

4. I cannot find in any case, English or American, an authority that the declaration of a dying person can be received as evidence *when he has a faint and lingering hope of recovery*. On the contrary, if he thinks he will eventually recover, though he be actually dying, his declarations cannot be received. Dingler's case, Leach, 638. Chit. C. L. vol. 1. p. 464.

N^W YORK, Riley, on the 3d day, at the hospital, is to be considered as
March, 1824. proper testimony.

The People

v.
Anderson.

The defence was then commenced by Mr. Blake. It is certainly painful to have to address a jury on such subjects ; and when the prosecuting attorney stated to you this morning that he feared the evidence was such as must establish the guilt of the prisoner, I was afraid the case could not be resisted. But very different are my feelings now ; and entertaining as I do, from the laborious investigation you have given to the evidence, a conviction of this man's innocence, it will gratify me if by my very feeble abilities I shall be able to impart this conviction to your minds. The responsibility you have to discharge is solemn, and will be duly weighed by you ; for your sentence, if given against the prisoner, is loss of life—loss of that which cannot be recalled. The liberty, the property of man you may take, and if error has directed the decision, it can be restored ; but life once gone, and the Deity alone can then show mercy. Man's power ceases at the grave. As to presumptive evidence, gentlemen, I am not about to occupy you, and seek to harrow up your feelings, as was done by learned counsel last night, with cases, part of which may be true, but of which the greater part was probably false ; nor do I mean to inveigh against circumstantial evidence at large, seeing that such evidence can alone sometimes lead to the detection of guilt ; but to caution you that such a degree of certainty is necessary as will enable you to say, beyond all reasonable doubt, that the prisoner is guilty. [The counsel here read from Phillips an extract as to the nature of evidence, and particularly on Justice Buller's charge. The counsel went on to refer to Lord Hale, 229, 230.] The prosecuting attorney will possibly urge in this case that if the prisoner

here be not convicted, no conviction can be had ; yet gentlemen, it cannot be doubted by any one, that in the case yesterday, (alluding to Johnson's case,) the chain of testimony was complete without the confession ; but how different from this. Circumstances which can justify a verdict of guilty must be such as are proved to have existed, and cannot have existed compatibly with the innocence of the prisoner. As to the facts in this case, gentlemen, it will be doubtless gravely urged to you that threats thrown out by the prisoner eighteen months ago evince malice against the deceased ; threats, gentlemen, that were extorted by the notorious fact of the deceased having seduced and borne off the wife of the prisoner, a provocation which not one in the jury box, I am sure, would not have resented, not merely with threats, but with punishment. The prisoner is a black man, indeed ; but a black man has feelings like us—feelings that are to be lacerated by the greatest calamity that can befall any man, black or white. But how did the prisoner behave under this provocation ? With moderation to the laws that many of higher station and degree would not have exhibited, he applied for redress to the tribunals of his country, and had the deceased punished. This showed no malice nor lawlessness. The next fact is the finding a dirk in possession of the prisoner ; and because an old dirk, given to him by an old master, and kept as a keepsake, is found in his house, he must be the murderer : and the prosecutor gravely measures the length of the wound, and the breadth of the rent ; and actually, before your eyes, fits the dagger to the rent of the waistcoat, and says, “ look there ! this must have been the instrument.” Gentlemen, we should not have far to go to find many daggers that, pushed in a little more or a little less, would fit the rent also. Then

N^W YORK,
March, 1824.

The People.
v.
Anderson.

N^W YORK, as to the prisoner's examination, which has been read, though not intentionally, on the part of the justice, it is manifestly calculated to entrap; yet, such as it is, it is much more indicative of innocence than guilt. (His counsel here examined the nature of the police examination, and inferred from it the fact, that it bore all the appearance of a cross-examination of a witness by an intelligent lawyer, and not like a document drawn up merely for the discovery and assertion of the truth. After alluding to the other facts in evidence, the counsel adverted to the self-possession and calmness of the prisoner, as contrasted with the agitation proved to have been evinced by Johnson yesterday, and inferred from it, with considerable force and ingenuity, that nothing but conscious innocence could have sustained a poor, friendless, ignorant man, under such a trial,—a trial under which the comparatively more influential, wealthy, and intelligent criminal of yesterday sunk.) As to the dagger, so far from operating against, it will be found to confirm, the innocence of the prisoner, and that from an almost miraculously immaterial circumstance. The surgeon, it will be remembered, testified that the blow inflicted must have required considerable force: the watchman, too, states that the appearance of the dirk is the same now as when found. Well, gentlemen, this blade is now spotted, not as one of the witnesses imagines, with blood, but with a soft substance, more like cobbler's wax than any thing else, which easily comes off, and which, I feel very confident you will say, could not have remained on, after so desperate a thrust as that inflicted on the deceased. This apparently immaterial circumstance you will, I am sure, say, when you come to examine the dagger in your room, is of high importance to the prisoner. But not only did

The People
v.
Anderson.

this dagger probably not inflict the wound, but is it not presumable that the deceased was mistaken in the person who gave him the blow? It was dark; the complexion of the parties increased the difficulty of discerning features, and it might as well, for aught that could be seen, have been any other black man as this. The counsel concluded an address of no inconsiderable force and merit, by a strong appeal to the extraordinary excellence of the character of the prisoner, as established by witnesses inferior to none in the city for respectability.

N^Y YORK
March, 1824.

The People,
v.
Anderson.

Mr. Wyman followed on the same side. He would make but few observations in addition to those they had heard. In this case, it must be found, first, that there has been a slaying, and then that it has been accompanied with malice aforethought. As to the declaration eighteen months ago, that prisoner would have satisfaction, it cannot be held by you as that sort of malice contemplated by law, even if taken in its utmost latitude; but even this has been explained by the witness, Gordon, to refer to satisfaction by course of law. The chief evidence in this case is circumstantial, a species of evidence always to be received with great caution. (The counsel cited instances of its fallibility.) We look to you, gentlemen, so to examine and sift the testimony as that, if it can be done, the fact of the murder may be made out, and yet the prisoner at the bar be innocent. (The counsel then examined separately the testimony given by the respective witnesses, commenting on them as he proceeded, and contrasting them where they differed, and concluded, by urging upon the jury, that from all the circumstances, from the confidence prisoner had manifested in his own innocence, from his retaining in his possession that dagger, which, if it had been in his hands the instru-

N^W YORK,
March, 1824.

The People

v.

Anderson.

ment of murder, he would have disposed of beyond the reach of human eyes, they could not but believe that James Anderson was not guilty.)

Maxwell, District Attorney. In our country it does not often happen that public officers and tribunals are called on to pronounce on cases of life or death. It is happy that we live in a community where the life of man is thus tenderly regarded; and in proportion to the infrequency of such trials, is the unwillingness to act when such cases occur. But it is not a light matter; nor is it proper to set out on such occasions with a desire to look for circumstances justifying prisoners, when such circumstances can only be sought out at the expense of the facts. It is painful to every man of humanity to pass against the life of a fellow being, no matter what colour the Almighty may have stamped upon him, even under the conviction of guilt; but such feelings must be discarded in the discharge of a public duty, and, as the humble minister of the law here, I must say that in my judgment such is the nature of the evidence in this case, that you must convict the prisoner at the bar. Before entering on the body of the cause, I will advert briefly to a few objections made in the able and eloquent defence that has been made: the first is as to time—that there was not time enough between the period when Gordon separated from prisoner in Chatham street, and half past 9; and Mrs. Binks tells you the prisoner came home about a quarter past 10, and it was not 11 when the watchman took him up. Riley tells you it was half past 10 o'clock when he found the deceased wounded in his cellar. I submit to you, then, whether there was not ample time between that when the prisoner parted from Gordon in Chatham street, and that at which he went home, to go up to 37

Bowery, and inflict the wound in question ; it is obvious there was. Then as to the matter on the dagger :—I do not mean to enter into the discussion of whether this be cobbler's wax, as said, or clotted blood ; but admitting it be as contended by the counsel, shoe-maker's wax, I submit to you whether it be not so hard as to resist the blow supposed. If gentlemen doubt, I invite them to make an experiment on doubled clothes, and they will find it will penetrate the folds without breaking off or erasing this matter ; and when penetrating the body it was lubricated by the blood it shed, and its passage rendered easy. But this dagger, says the counsel, if the prisoner had been guilty, would have been thrown from him, and all trace of it be lost. Sir, if the prisoner had supposed that the life of his victim could have survived the deadly blow long enough to reveal the name of the murderer, that dagger would never have been seen in this court. It was confidence in the efficacy of its plunge that induced its owner to preserve it. But character is relied on. It is a melancholy truth that many in this country and in England, who have stood in the fullest confidence of their fellow citizens, have nevertheless been guilty of crimes. (The case of Dr. Dodd in England, and Noah Gardner in this city, were particularly referred to, as proofs, that character of itself was no security against crime.)

Having said thus much as to the objections, I will refer to the facts in proof. It has been asked what motive could influence the prisoner to this crime ? A passion, gentlemen, more deep, more violent, more headstrong, than even that thirst for pernicious gold which but yesterday, we saw had driven another to commit the crime of murder—the passion of jealousy. Gordon, the friend of the prisoner, has stated the existence of this feeling, and

N^W YORK,
March, 1824.

The People
v.
Anderson.

N^W YORK,
March, 1894.

The People
v.
Anderson.

it explains the conduct of the prisoner. Nor is this a jealousy existing in the mind alone. Gordon tells you that three months before this murder, you have it in evidence, that deceased taunted prisoner about his wife. You have, too, in evidence the threats of the prisoner. Can it be said, then, that with these threats, this quarrel, another person could have perpetrated the crime? If any quarrel had existed between the deceased and any one else, it might have been proved, and must at any rate not be assumed. (The district attorney then examined the testimony at length, laying particular stress upon the declaration made by the deceased to Riley after he went to the hospital, and believed himself dying, that the prisoner inflicted the wound; and also upon the examination of the prisoner, as taken at the police office the day after the death of the deceased.)

Having gone through the facts, I will call your attention, in order that we may not differ about the law, to some few authorities, and it shall be briefly. (Referred to 1 Chitty, 234. respecting the undue enormity of punishment inflicted for a slight transgression; quoted in reference to, and in the hypothesis of the truth of the statement in prisoner's examination, that on the evening of the assault deceased first took up a brickbat as if to attack prisoner. Other authorities were also adduced on the general points.)

Gentlemen, the prosecutor concluded, I have now done my duty. It has been a painful duty, and one in the discharge of which, I trust, you will not think I have been unduly pressing; and I can only pray that you may differ from me, if you can do so consistently with your oaths.

By the Court.—So much has been said, gentlemen, relative to the declaration of the deceased, that we consider it necessary to caution you in the outset that it is important you should separate in your minds, and divest of all effects, the affidavits which may have been said to be made by deceased, or the mere assertion of counsel, from what has been legally proved. That the deceased came to his death in a violent manner, is not disputed; it is for you to decide whether the prisoner at the bar inflicted that wound; and if so, under what circumstances: whether under circumstances that would constitute it murder or manslaughter, or justifiable homicide. (The Court here marked out the distinctions between these offences, and then recapitulated the facts in evidence.) In reference to the attempt to prove an *alibi*, all the time had been accounted for but about fifteen minutes; and it is to be conceded those 15 minutes might have been sufficient for the commission of the crime. Assuming, for the sake of argument, that he did commit this crime, it then remains to be seen with what disposition it was committed. (With this view the judge read Gordon's evidence over, thinking it highly material, and commented upon it, particularly on the fact that prisoner had invited that witness to go home with him, which appeared to negative the idea, that the prisoner at that time contemplated murder.) Then, as to the lameness of the prisoner, it also appeared very material, as it rendered it difficult to reconcile with probability the idea of this lame old man attacking, with premeditation, and with such an instrument, a young athletic man, as deceased is proved to have been. (The Judge carefully read and weighed all Gordon's testimony.) He then adverted to the examination of the prisoner—put it to the jury to deter-

N^Y YORK,
March, 1894.

The People
v.
Anderson.

N^W YORK,
March, 1824.

The People
v.
Anderson.

mine whether, under all circumstances, the interview between deceased and prisoner was not an unpremeditated thing. The confession of the prisoner appears to bear the intrinsic marks of truth; for his story is one that would hardly have been feigned or contrived. After all this investigation, it remains to be ascertained what crime was committed. It is clear, there was no cool, premeditated malice. There may indeed be murder, without long meditation; but the story here is, that prisoner was menaced by a young, athletic man, with a brick-bat.— If, in order to save himself from such an assault, he had used his dagger from a belief that his life was in danger, it would be justifiable homicide. If he could have escaped by flight, but chose to remain at the hazard of life, it is manslaughter, but no murder. Connected with this part of the case is this dagger, and this is undoubtedly an unpleasant feature of this affair. How prisoner came to carry this dagger, is the question. It appears there was a previous quarrel between prisoner and deceased, and the prisoner might have thought himself liable to have been assaulted by deceased, and armed himself to guard against it: but even if this were true, it cannot be considered a justifiable act to be thus armed; as the consequences of going so armed, often proves fatal to life. The reasons suggested may perhaps account for the prisoner being armed with this dagger, without imputing necessarily an intention to commit murder.— Then, as to the declarations of the deceased—that made in the presence of prisoner, when carried to deceased's house by the watchman, being as promptly and fully denied by prisoner, must not be considered as going for any thing. As to the declarations to Riley, after deceased became aware of his approaching death, that

"Anderson stabbed him;" this is the naked fact: but Anderson may have stabbed, and yet not have murdered him. And may it not be inferred, that at such a moment, if deceased had not been conscious of some provocation on his part, of having been the aggressor, in a high-handed manner, he would not have reflected with satisfaction on his own conduct, and would have spoken, therefore, without anger, of the prisoner's act? As to these confessions, too, if you should be of opinion that the court decided wrongly in admitting them, as evidence, you are at liberty to, and must reject them. You are also, if they are received by you, to weigh them with other testimony, and determine for yourselves as to the degree of credit to be attached to them. After treating of all the other topics, the Judge said, that as to the character, it must be admitted that the prisoner had established a very excellent one; but character, it must be borne in mind, was too often forfeited. After all, gentlemen, the case rests with you. If guilty of murder, it is your duty to say so, and the law must have its course. If you think him guilty of manslaughter, you will say so: but you must only pronounce a verdict of guilty of murder with a clear conscience, not by a mere inclination, as by the dust of the balance of your mind, but according to rational evidence. If not guilty of murder, in your judgment, it is competent for you, under the indictment, to bring in a verdict of manslaughter; with these remarks I deliver the cause to you.

The jury retired at 11 o'clock, and at half past 11, returned with a verdict of "GUILTY OF MANSLAUGHTER."

N^W YORK,
March, 1834.

The People
v.
Anderson.

[In presenting the case of David How for the murder of Church, (which depended entirely upon circumstantial evidence,) to the public, I cannot resist the opportunity of expressing my sentiments in favour of that species of evidence. A very absurd, but dangerous attempt has been made in the public papers, to destroy the true character and weight of this species of proof in the minds of the public. The case of Hamilton has been published, cited, and commented upon, for the apparent purpose of showing his innocence, and the danger of relying upon this kind of evidence. The Vermont case, (Bourne's) is cited on every trial where any doubt exists of the guilt of the prisoner. Hoag's als. Parker's case, reported in the City Hall Rec. is always read to show the equivocal nature of circumstances. It is the hobby-horse, in this city, upon which every lawyer rides, but it throws them all—the judges smile when the case is read. Who does not read the black cases (as they are aptly termed,) in the appendix to Philips' Evidence, in favour of his client? The truth is, this kind of proof is often more satisfactory than the direct testimony of witnesses. The life, property and liberty of the citizen depend perhaps more upon the former than the latter. As to crimes, they are almost always committed in the dark, out of the sight of witnesses, and if the guilt or innocence of a person is not to be made out from a fair and impartial inference from facts and circumstances, a very great portion of crimes and misdemeanors could not be punished at all; the consequences would be the most fatal that could be conceived. On the trial of Capt. Donnellan, Justice Buller observed, that "A presumption which necessarily arises from circumstances, is often more convincing and more satisfactory than any other kind of evidence; it is not within the compass of human abilities to invent a train of circumstances, which shall be so connected as to amount to a proof of guilt, without affording opportunities of contradicting a great part, if not all of those circumstances." See also Miss Blandy's trial for the murder of her father, St. Tr. vol. 10. p. 32.

It is true, presumptions can never amount to demonstrative proof, nor is it necessary that they should. If they induce a full and firm belief, a jury will have but little difficulty. Moral certainty is all that can be expected in this species of proof, and is all that is essential to the due and impartial administration of justice. Moral evidence, (of the kind we have been speaking,) is generally complicated: it depends not upon any one argument, but upon many independent proofs, which, however, combine their strength, and draw on the same conclusion. In point of *authority*, demonstrative evidence is superior: moral evidence is superior in point of *importance*. By the former, the understanding is enlightened, and many of the elegant and useful arts are improved. By the latter, society is supported; and the usual but indispensable affairs of life are regulated. To the acquisitions made by the latter, we owe the knowledge of almost

every thing which distinguishes the man from the child. See Wills' Lec. vol. 2. p. 64.

If by a concatenation of circumstances an innocent man may have been convicted and executed upon circumstantial evidence, how many, it may be asked, have been sacrificed by the positive testimony of perjured witnesses? The argument applies with equal force in each case, and only proves the imperfection of human nature in the conduct and intercourse of man with man. It by no means weakens the force of circumstantial testimony. Chitty, in his valuable treatise on criminal law, vol. 1. p. 459.) says, "From the obscurity with which some kinds of crime are frequently covered, the jury must often be compelled to receive evidence which is merely circumstantial and *presumptive*. It would be to little purpose to detail the curious distinctions which some of the older writers have taken, and the multifarious instances with which they have endeavoured to explain them. It seems, however, to be a good general rule, that no one ought to be convicted before a felony is known to have been actually committed; so that no man should be found guilty of murder before the death of the party is actually ascertained, nor of stealing goods, unless the owner is known, merely because he cannot give an account in what way they came into his possession. But the circumstance, that individuals have occasionally suffered on presumptive testimony, whose innocence has been afterwards ascertained, ought not to prevent juries from attending, with caution and deliberation, to this species of evidence; for the evil is comparatively small to that general impunity which the worst offenders might obtain, if this kind of proof were never to be regarded." See farther the law upon this subject, 1 St. Tr. p. 181. 3 St. Tr. 939. 4 Black. Comm. 352. 2 Hale P. C. 260, 289, 296. McNally's Ev. 398, 399, 400. 1 Hays, 436.

[Church was called out of his bed at 1 o'clock in the morning, by a person pretending to have a letter for him, and as he opened the door, was shot dead on the spot.

A summary of the circumstances upon which the prisoner was found guilty of this murder are as follows:

1st. He had frequently complained of Church's conduct to him in defrauding him of his property, &c.

2d. He had used threats against Church to a number of people. And on one occasion had threatened to take his life.

3d. He had endeavored to persuade a person to assist him to put Church out of the way.

4th. He had threatened to shoot him.

5th. He was proved to have been lurking a few evenings before the murder, with his rifle, and endeavouring to conceal it.

6th. He left the village of Angelica the same evening, and in time to have committed the murder.

7th. He had something under his coat, exhibiting the appearance of a rifle.

8th. His suspicious conduct in the evening of the murder.

9th. In the morning, the horse upon which he rode on the evening of the murder was found wet with sweat.

10th. His false statements about his horse being sick.

11th. The ball with which prisoner was shot matching the one found in the prisoner's rifle box.

12th. The lint and horse hair found adhering to the rifle.

13th. The patch and tow wadding found in the house of the deceased near where he lay, &c.]

OYER AND TERMINER.

ALLEGANY COUNTY, (N. Y.) FEB. 1824.

The People }
v. } MURDER.*
David D. How. }

Present—Hon. Wm. B. Rochester, Circuit Judge.

Hon. John Griffin, Vial Thomas, } Judges of
Sylvanus Merriam, Clark } Allegany
Crandall, and Thomas Dole, } Com. Pl.

Counsel for the people, Samuel S. Haight, Daniel Cruger, and John C. Spencer, Esqrs.

Counsel for the prisoner, Fletcher M. Haight, Alvin Burr, and Felix Tracy, Esqrs.

On Tuesday, February 3d, the prisoner was arraigned on an indictment for the murder of Othello Church, to which he pleaded *not guilty*. On being asked if he was ready for trial, he answered in the negative, as he had not sufficient counsel, and was unable to employ others. The court informed him that if he had any choice in counsel he could then make his election: prisoner requested that Fletcher M. Haight and Felix Tracy, Esqrs. might be assigned him to assist Alvin Burr, Esq. who was employed, which was accordingly done. Prisoner

*This report was copied from the minute book of Judge Rochester, and may therefore be considered as correct. It acknowledges, with pride, the civility of his honor the judge, and S. S. Haight, Esq. The case is one of great importance, as depending entirely upon circumstantial testimony, and furnishes another instance, (if another is necessary,) of the strong character of this kind of proof.

was informed that the next morning his case would be called on. ALLEGANY,
Feb. 1824.

Wednesday, Feb. 4. Counsel for prisoner requested a few hours longer to send for witnesses, which was granted, and the cause was set down for 12 o'clock that day. The People
v.
Dav. D. How.

At the time appointed, the prisoner was brought into court, and after several challenges, the following jurors were sworn :

Daniel Scott, Isaac Smith, Amasa Hall, Peter Bacon, William Rose, Luke Maxon, George G. Paterson, Joseph Haynes, Ephraim Rowley, Joseph H. Root, Simon Williams, Horace Whitney.

Samuel S. Haight, Esq. opened the cause on the part of the people.

TESTIMONY ON THE PART OF THE PEOPLE.

Abraham Aldrich sworn.—The notes shown were executed by prisoner, Othello Church, (the deceased,) Luther Adams, and witness ; one for 475, and the other for 50 dollars, dated Dec. 23, 1822 ; they were given to raise money for prisoner.

John Ayres—Saw Othello Church last fall after wheat was harvested, which was raised by How, take possession of it and corn and exercise over it acts of ownership.

Stephen. Smith—Saw prisoner's family : resides at the Dautrement farm. How afterwards told witness that Church had all the property on the Dautrement place—had full scope, and hoped he would be satisfied. This conversation was last fall after How was liberated from the goal limits. On second consideration, does not know but this conversation was before How was confined.

Alexander Dautrement.—In September How told witness he was going to settle with Mr. Church—he and Church had a conversation ; they appeared to be irritated, and could not agree on settlement. Some time after, perhaps November, witness asked How if he had settled with Mr. Church, and How replied that he expected it would be settled. The last time witness spoke with How, the latter said Church was damned foolish, and did not do as he wanted him to do. How did not appear to be irritated. A few days before Mr. Church was killed, How said he could not settle with Mr. Church. On one occasion How said that Mr. Church, Mr.

ALLEGANY, Wilson, Col. Hull and Mr. Palmer had leagued together to ruin him, and he would have revenge out of some of them.

Feb. 1824. This was a few days before Mr. Church's death. How reckoned that these four had combined to ruin him. This conversation took place in reference to Church's having his property as security, and to his complaints against the others. He complained that Church was hauling away his grain.

The People
v.
Dav. D. How-

Cross examined.—Says this conversation was at witness's house: he mentioned the names of all those four persons. He said they had stripped him of his money and property; that he had the means of *revenging* himself, and if he could not one way he could in another. In the first or second conversation How said he had money, and could buy judgments against these persons.

Mrs. Dautrement.—About the middle of October How complained that the sheriffs and Mr. Church had stripped him of every thing—that they had got all his money, and now he was as bad off as ever. He mentioned Wilson, and Palmer, and Church, and Aldrich, whom he thought as bad as any. When he first came home in September, he said he had money and could buy judgments.

Adeline Dautrement.—Does not recollect any thing but his abusing Mr. Hull very much—never heard him abuse Church.

Elijah Osgood.—How and witness have frequently conversed together; in the last conversation, between the 10th and 15th October, How said that Church had then gotten his property, pretty much in his own hands, and that he had been trying to make arrangements so as to get his property into his own hands. He said Church was a difficult man to get along with; though if he could get his property in his own hands, he could make such arrangements as to pay Davenport, who held the demand against him in which Church was security.

David Crandall.—The week before Church's death How said, that if it had not been for his family he would have used powder and ball among the seven devil tribe; this was when talking of certain mills that were burnt, belonging to Mr. Palmer. Mr. Church's name, and no other person's name, was mentioned.

Moses Thompson.—Three or four weeks before Church's death, witness fell in company with How, who said some person was fetching grain from his place. How said he should be under the necessity of taking a musket to the damned rascals. This was in Angelica village. No names were mentioned.

Amos Freeman—Knows prisoner. On 23d December last How came to witness on the Dautrement farm, where witness had charge of Othello Church's property. How came just after daylight, and invited him to a private interview in the barn, when How took out a bottle of whiskey and said, if you will be my friend, I will tell you what we will do with Aldrich and Church. Witness replied he did not care much for Aldrich, but he would not do any thing to injure Othello Church. How said poh! come take a good drink, for I have come to take a serious talk with you—take a drink and I will tell you. He then took witness by the hand and asked him if he could swear eternal secrecy. Witness says he hesitated. How then asked him if he was a mason. Witness answered no. How said you know what I mean, you can keep a secret. Witness then promised How that he would never divulge any thing he would tell him. Mr. How then took him by the hand and said, you swear. How then said that Aldrich and old Othello were two of the greatest rascals he knew. How then continued: Now I mean to have my revenge. Had previously said that revenge could not be got by fair means. Oh then, says How, Freeman, it is worse than death. Spoke of Church's cattle, and eating the corn and pumpkins, and said he could not stand it: told witness to keep the keys of the farm. Now, Freeman, says he, I will put a stop to this, and if you will befriend me I will put \$250 or \$300 in your way. Freeman said that he would not be willing to injure Church for half the property on the farm.

After taking another drink, How asked witness if he thought Church his friend, and doubted whether he knew how he talked about him. How spoke of the crops and the debt that Church had to pay out of it. How estimated the debt at \$500. Witness told How that Church estimated it at \$900.

He then said that Church was a cursed villain, the greatest enemy he had, and would go any length to injure him.

How complained of Church taking away onions and straw. How then began to appear irritated, and said, I am determined on revenge, and I will have it soon; and if you will be my friend you shall have half the property. Witness asked him in what way he would go to work? How replied, Freeman, if you will be my friend, we will soon have old Othello out of the way, and then there will be nobody to molest us.

Freeman then got up to go away; How took him by the hand, and wanted him to stay. On going to the house, How

ALLEGANY
Feb. 1824.

The People
v.
Dav. D. How.

ALLEGANY, said, if Freeman would hear to him, he would make a man of him; they then parted.

Feb. 1824.

Previous to this, in conversation with How, How asked witness if he could keep a secret, and witness replied that he could: same night How asked witness if he did not think Church meant to keep all his property. This was three or four weeks before last conversation, at Mr. Sherman's, in the bar room alone—others in bed.

The People
v.
Dav. D. How.

Cross-examined.—How asked witness if he had not kept an account of what was taken off the farm; and told him to keep the keys, and keep an account of what was taken off after.

On coming out of the barn, after How found witness would not stay, How said he had not said he would resort to unlawful means, have I? Witness says he was then confused, and replied, *you have not said you would.*

Elias Hull.—At witness' house shortly before 15th Oct. when Church came in possession, How said Church had agreed, provided he came into possession, to make him, How, his agent. Witness remarked, Church is too prudent a man to do so; and How replied, if he don't, he shall not trouble me many days. Witness reproved him for his language, saying it looked like threatening life. How said, witness might think so—that he, How, did not value his life a straw without his property. Witness said you won't kill him. How replied, you may think so, but by God, if he don't do as he has agreed, I will kill him.

On the 14th Oct. in another conversation, referring to his former remarks about Church, he said, witness might think he was in jest, but that he was not in jest, for he was in earnest; and repeated his previous threat.

Cross-examined.—Thinks Van Wickle came with How the night of first conversation. How was then anxious that the possession should be transferred from Hull to Church: it was transferred on 15th Oct.: How wished Hull to sell to Church. How was fearful Hull would evade the arrangement which he alleged he had.

Thinks How took witness one side in last conversation, and said, there has been hard feelings between How and witness. Church was there the time of last conversation.

Bradley Sherman.—Saw prisoner at his father's house the evening before Church was killed. How came about 7, and staid until about 9. He ordered his horse fed: he was fed with a peck of oats. Don't know that he ate them; discovered no oats in the manger next morning—other horses might have been fed there; don't know that any horse was fed under the shed.

Alexander Dautrement.—Saw prisoner at his house a little before 8, the evening before Church was killed; was then a little after 9, observed How stoop down to pick up a tumbler—he had a great coat on. As he stooped down, something raised up his coat—believed the coat was bound round his body. When How paid him, raised up his coat with his right hand to his pocket, keeping his left arm and hand to his side, which had something of a bulge under his coat; didn't see him get down.

ALLEG'NY,
Feb. 1824.

The People
v.
Dav. D. How,

Hiram Newton. Saw How at Dautrement's, the evening spoken of by Dautrement; saw him stoop down and saw the back side of his coat stick out on the left side; thinks a stick three or four feet would present a similar appearance. His coat was buttoned up close; he was there at 10—was gone when witness went to bed.

William Lawrence.—Saw How at Dautrement's on the evening: did not see him stoop; saw the bulge in his coat, which looked as if there was something under it like tea; saw How set down sideways on a chair, his left leg on the chair.

George Miles.—Between 9 and 10 saw How at Dautrement's; his conduct was rather unusual; he was cordial for the first time; there having been some previous coolness. How appeared to be agitated, changed his subject, talked about his wife, which was singular—in general talks a good deal.

Mrs. Amy Steenrood.—The night Church was killed witness was up as late as 12 or 1 o'clock, a man of prisoner's bigness passed witness about 1 1-2 mile this side of Church's; he was on horseback—the horse appeared to be dark and so did his clothes; about half an hour after a man passed back riding very fast. She supposed the man to be going after the doctor.

Hugh Higgins.—Resides about 7 miles from here, and 3 miles this side of Church's—heard a horse go by, coming east, between 1 and 2; a person was on the horse; he went into two and a half miles from McCoy's.

Jabez Higgins.—describes his residence between How's and McCoy's rising half a mile from McCoy's, and is at the intersection of the roads—heard something which was going pretty fast, which he then thought was a sleigh, appeared going towards How's, was afterwards waked up by sleighs with bells, not to the extent of an hour after.

Russell Harrison.—Partner with Hugh Higgins in Saw mill—heard a horse going to the west about 12—got up and saw it with a man on it.

ALLEG'NY, *Mrs. Church.*—Between the hours of 1 and 2 A. M. 30th
 Feb. 1824. Dec. last, Mr. Church was asleep—somebody rapped at the door
 of Mr. Church, and said he had a letter for him. Church de-
 sired him to come in—he asked Church if he would come to the
 door—Church said he would—he did so—when witness heard
 the report of a gun. Church fell, exclaiming “Oh God,” and
 groaning, instantly died.

The People
 v.
 Dav. D. How.

Mrs. Church had'nt seen How for a year, though she knew him. The person appeared very polite, saying I have a letter for you. She does not undertake to say whose voice it was—she did not at the time think of prisoner.—Ball passed through Mr. Church, and struck in the joist—house gabel end to the road—kitchen back. Mr. Church slept in the kitchen—no ceiling over head. Ball was taken from 6th or 8th joist.

Doctor Dana—was neighbour to Church—went over on being called, past 1 o'clock, and went in and saw Church's body—examined it and found he was dead—ball went in about an inch below the left breast, and came out from 3 to 4 inches lower than it went in; his shirt was burnt—the wound had the appearance of a ball wound—there was a ball found in a pine joist about 12 feet from the door—saw Luther Adams take out the ball.

Orange Church.—Was there 10 or 15 minutes after his father was killed; he saw Luther Adams take a ball out of the joist—saw no appearance of a ball in any other part of the room. Adams handed the ball to one man, who handed it to witness—don't think another ball could have been substituted—satisfied it was the same ball.

Stephen Smith—Laid awake at one, and heard the noise of a gun—heard a female voice from Church's—went to Church, and there found Doctor Dana. Witness pursued in a single sleigh—James Read and others rode in another sleigh with bells—went directly to How's house—went to the door, rapped: Mr. How bid him come in, on first rap at once. How said, what's the matter? Witness replied, Mr. Church is murdered—he is shot:—the woman replied, it can't be from here; for we havn't had a gun in the house for 6 months. How replied to the woman—yes, there is—there's Wilson's gun. By this time, 8 or 10 had got into the house. Mrs. How said, what are you looking after?

Saw nothing uncommon in prisoner's clothes. How wanted to know what he was going to do with them—laid them down, then went with Mr. Heath to the barn, found 3 horses; first was dry, and blanketed: the next was very wet—had the appearance of natural sweat, with smoke rising

from the breast. The horse was eating hay—a dark colored beast—didn't observe the horse breathe uncommonly hard—did not discover any particular print of saddle or harness.

ALLEG'NY,
Feb. 1824.

James Read—Went to How's house that night—on getting there, went to the stable—found 3 horses—the middle was sweaty.

The People
v.
Dav. D. How

Returned to Mr. How's about 9 o'clock—saw a short rifle lying on the table—rifle came within the width of two fingers from his toe to his vest: examined it, and pulled up a horse hair under a piece of the mounting—end of ram rod seemed some wrapped with cotton, wool, or lint. The gun appeared to be loaded—about 1-4 the priming appeared to be wet, as if it had been reloaded without wiping. Gun was found in a bed-room.

Cross-examined.—Saw the ball which Orange Church had. He compared balls found with the rifle with it—a wheat corn would balance them—found some balls on the table, lying with the rifle:—they were rather too small for the rifle, which was a cut one. Many rifles carry balls of the same size.

Josiah Utter—Was present at How's on the night—concurs with Smith as to appearance of the horse—couldn't determine whether there was the appearance of a saddle—the horse was wet and smoked—next to the horse's withers the hair was rough—print of saddle would disappear in winter sooner than in summer—the hair is not then so long—there was a saddle in the house—judged from appearance that the horse had not been recently rubbed.

Romanzo Brooks—Was at Church's not long after his death—found a patch and a tow wad close to Church, as he lay on the floor, betwixt him and the door, laid them down, and then could not find them—the patch he supposed to be linen—he called it home-made tow cloth—he examined it by candlelight—the patch was nigh square; about an inch.

James Read again.—The next day after he first saw the rifle the patches were square; he found patches in the box of the rifle—they were white and clean—his impression is they were about an inch—were cotton cloth—of this can't be positive.

Aaron Brown.—Two nights before Church's death saw the rifle at McCoy's—when How went off, he took up the gun from the side of the garden fence and went off with it—it was a short rifle—had been cut off—was called the Wilson rifle—thinks 4 feet long. He took the gun up about 2 rods from the

ALLEGANY, north door. How asked witness what the gun was worth. Mr. Feb. 1824. How said he came round on the hill, and perhaps might find a deer and get a shot at it—was not at McCoy's when How came there.

The People

George Doty.—Saw the prisoner once in September, at Chapman's tavern; said he had been pretty hard run by five or six—mentioned no names—said it was a long lane that had no turn.

TESTIMONY FOR THE PRISONER.

Emily Redfield.—Was at home the afternoon before Church was killed. How used the gun to shoot at quails—she heard the gun discharged—shot one. House stands back from the road—has two outside doors; one goes into kitchen, and one into another room. The gun was sometimes carried into another room, which had no outside door; she slept in a middle room, through which you would have to go to get in there; she heard nobody go through her room that night. How slept in the kitchen. Gun was at How's.

Cross-examined.—Two or three weeks before Church's death, gun was carried out to the gate two or three times, once by Wilson, and another time by David and prisoner. The last she saw of the gun was standing up after the quails were shot at, whilst they were loading it. Did not see the gun next morning, until Mr. Read came there. She was not in that room that night.

David How, jun.—Brought the horse out for his father when he started—saw no gun about him—gun was usually kept round in a back room not occupied by the family. Witness was not in that room that night—gun was called Wilson's gun. Wilson sometimes took the gun out to the gate:—Wilson, he and father brought back the gun from the gate four or five days before. Horse blanket was thrown on the gun in the sleigh.

Cross-examined.—His father left home at one hour after dark—it was so dark he could not see his father far, though he saw him get on the horse. His father once took the gun out to the gate—bay mare, with white face—had other horses—Remembers the coming of the party in the morning. Witness and Wilson got up about daylight. Witness first saw the gun second coming. Prisoner wore the same coat he now has on.

There was but one window, about six feet from the table where gun lay—window about 4 feet from the ground.

The same horse which his father rode was sweaty in the

morning—he stood between two other horses. Wilson had frequently taken the horse out to the gate with him.

ALLEG'NY,
Feb. 1824.

Stephen Smith.—How came to the village of Angelica willingly with witness, and his party before prisoner was arrested.

The People

Joshua Hicks.—Knows Amos Freeman; 4 weeks ago this witness conversed with him at McCoy's.

DAV. D. HOW.

Mr. McCoy and witness asked Freeman if he had not reported that How had made overtures, offering him half the property: he said he had not. He went on to state that he had a conversation with How—that he surmised from it, that How meant to injure Mr. Church, though Mr. How made no threats, and that the witness had put Church on his guard.

John McIntosh.—Knows Amos Freeman: three or four weeks ago Freeman was at witness's house. Questioned thus:—It has been reported that Mr. How offered you a premium to take Church's life. Freeman said it was no such a thing; he denied wholly that How had put such a question to him; and such a proposal would be unpleasant to him, for he was above it.

Witness reminded him that he had testified so; he replied, it was a lie; that he never had sworn to such a thing.

Angus McIntosh.—Was present part of the time: same conversation—heard questions put to Freeman, and heard Freeman answer saying it was a falsehood; and appeared to be disturbed and affronted: being told he had sworn to it, he said it was a lie.

Francis Delong.—Knows Freeman; in the town of Allen, his general reputation for truth and veracity is bad. He has been sworn there several times—they are not on good terms. About four years ago W. had hostilities against him, but has not any at present—don't recollect ever threatening him.

Witness was party in two of the suits in Allen—Freeman's testimony was against witness's interest.

James Wilson (resides in Allen)—Knows Freeman—his general reputation is, that he is a man not to be depended upon when under oath.

Never heard the neighbours speak of his character for veracity except in reference to the trials in Allen, but on that account would not attach much credit to them in any case.

Chester Roach (of Allen)—Numan's reputation in Allen for truth and veracity is bad; some of the neighbours had reference to the trials—some not—but the greater part not, when speaking of his reputation.

ALLEG'NY, *Robert Barr* (of Allen)—Freeman was not thought by those
 Feb. 1824. who heard those trials, to be a man of truth and veracity, in his
 testimony at those trials. Mr. Delong, Mr. Wilson, Mr. Scotta,
 The People Mr. B. Bride, and others have spoken of them.

Jeremiah Fuller (of Allen) Knows Freeman—majority of the
 v. people in witness's neighbourhood think his character for truth
 Dav. D. How. and veracity bad—they mentioned the trials, and did not speak
 of his veracity in any other respect.

Josiah Whitman, of Allen.—Knows Freeman—majority of
 people heard speak about him, call his character bad—they have
 spoken in reference to those trials.

Mr. Wicks, again.—Horses will sometimes perspire profusely
 from some disorder; this is when they appear to be in pain—
 perspiration will appear sometimes to relieve pain, and will also
 give rise to smoke, the same as other sweat.

William Geiger.—Is acquainted with horses considerably, has
 seen perspiration produced by pain—belly-ache most apt to pro-
 duce it—horses will continue wet after pain subsides—the per-
 spiration will be chiefly in the flank and before the shoulders;
 they will smoke—has seen horses eat while in pain—they will
 eat after pain has subsided—sweat will then become stiff, and
 cease to smoke though the horse continues wet.

Henry Tracy.—Was in Burr's office, at the time of assign-
 ment—there was a dispute. Hull said he did't care what people
 said about him, if he could only sleep at night.

Bradley Sherman—Was in the bar room and kitchen and set
 down—did not observe any thing unusual about him, either in
 coat or otherwise.

Mr. Ayres.—Was called to testify about hauling grain to
 Church.

William Burns.—Was at Dautrement's—saw How—he and
 How were sitting together—observed nothing unusual about him.

Thomas Mathews.—Assisted in hauling grain from the Red-
 field farm for Mr. Palmer—dont know that Mr. Church had any
 there.

TESTIMONY ON THE PART OF THE PEOPLE.

Jonathan Post.—Conversed with Freeman a few days after
 jury of inquest—told him he had heard that he said Mr. How
 had made proposals to him to kill Mr. Church; he denied that
 How had made such a proposal—that How's proposal was, not
 to kill or murder Church, but only to put him out of the way—

thinks what he stated here under oath was very remarkably the same that he told witness, except did not observe him testify about the injunction of secrecy—there were several sentences of his testimony which witness did not understand.

ALLEG'NY,
Feb. 1824.

The People
v.
Dav. D. How.

Freeman has lived in Angelica, on the river, not far from Allen, for the last year, about seven miles from Scott's—has never heard, in the town of Angelica, a word against his character for truth and veracity, but has heard the unfavorable reports from people in Allen—never until of late heard any person speak, either for against him—his character in Allen is bad, growing out of those trials.

Mrs. Ann Church.—Freeman lived two years at her house—left there a year last fall—was a stranger when he came there—heard from Freeman, himself, that he was censured for his testimony in Allen—has heard his character for truth and veracity impeached, in reference to those trials—she cannot speak of his general character, except that her impressions were in his favour.

John T. Hyde.—Has known Freeman about three or four years—never heard his character for truth and veracity impeached until to day—Freeman came in a stranger.

Has known prisoner seven or eight years—don't know of his hunting—may have hunted frequently for aught witness knows—lives about two miles from How's—never saw him have a gun in his hands. Freeman on the next day after he was sworn, said he was going to write down what How had said to him.

Col. King.—Knew Freeman about two years—never heard but little said of his reputation for truth and veracity—never heard it impeached, until to day—witness resides in Friendship six or seven miles from Freeman's.

Moses Van Campen.—Has no particular acquaintance with Freeman—has known him some years—never heard any thing for or against him.

Doct. Dana.—Has never heard his character for veracity impeached until Mr. Church's death—his character for truth and veracity was never, in his presence, the topic of conversation, until since that event.

Stephen Smith, of Friendship.—has known Freeman two or three years—his character for truth and veracity has been good, is admr. of Church's estate, has heard as many as four speak of him, two in Friendship and two in Freeman's neighborhood.

Augustus Dautrement.—Has known Freeman two or three years—has never heard his character, as a man of truth im-

ALLEG'NY, peached. Witness resides in Schenectady, left here about a
Feb. 1824. year ago.

Andrews A. Norton, of Angelica.—Has known Freeman about three years—never heard his character for truth impeached—don't know that he ever heard his character for truth a topic of conversation previous to this affair.

The People
v.
Dav. D. How.

Mr. Taylor.—Has had some experience with horses—owned a great many—belly-ache generally causes bloating.

How.—Gives his opinion of causes and location of perspiration, and of the effects of medicine.

Amos Thatcher.—Conversed with How, two or three weeks before Church's death—How said he was inclined to leave his bail and go home, and take his gun, and put a ball through the first man that entered on his premises—he had been conversing respecting people drawing grain from his Redfield farm, viz. Aldrich, Mathews, Higgins never knew that Church had any thing to do with the Redfield place.

Judge Merriman.—In fore part of November, How talked of Church being in possession of the Dautrement farm—Judge was about buying some tubs of How—went down, found Church there, eating breakfast—How asked him to go to the corn house and see the tubs—Church agreed to deliver up the tubs—going back, How in talking about property, said he could'nt stand it; if Church was on the place, he must have it arranged in some way to have him off—had as lieve have the devil there, as to have Church there. How was trying to get Judge Merriman to sign a note to Davenport, so that he, How, might get possession of the property.

TESTIMONY FOR PRISONER.

William Byrns.—Was at Dautrement's the night previous to the murder; witness and prisoner were sitting on a bench at a table conversing together—they took a glass of grog; prisoner sociable, and saw nothing uncommon in him; witness staid all night—prisoner went away about ten—had a great coat on.

Thomas Mathews.—Assisted in hauling the grain from the Redfield place, where prisoner resided, for Palmer; does not know that deceased had any thing to do with it.

TESTIMONY FOR THE PEOPLE.

Wilson Redfield, sworn.—the day before Church was shot, after shooting quail, How and witness reloaded the rifle, with a patch from the box; saw the gun next morning as it lay in the room and was loaded, load was afterwards taken out, viz. Wednesday at Cuba, a very heavy charge; witness observed it;

there was no patch in the gun when the load was taken out; there was no tow cloth about the gun—a horse blanket was previously over the gun. Speaks of the condition of the horses. The black horse was sick; does not know that the mare was sick. There was tow between the powder and the ball. The load which witness and How put in, in the afternoon, was square, and of leather.

Daniel Tabar—saw the charge extracted at Cuba; no patch; about a double charge.

Alexander Dautrement—has seen the experiment with a rifle; appearance corresponded with what he observed about How as to sticking up behind, and partly as to bunch upon breast.

Cross examined—gives his explanation as observed a little testy; also the experiment of sitting on the chair.

Hiram Newton—saw experiment to-day, resembled How's appearance in projecting behind, that night.

William Lawrence—also saw experiment, protuberan cebefore was about the same as what he observed in How; a man sat down as How did, and nothing to be seen except the protuberance.

James Read—the man who tried experiment with the same rifle—done at the request of sheriff Wilson.

Doct. Dana—Mr. Spencer recommended the experiment last night, which was renewed by sheriff Wilson to day; corresponded with witness's idea.

Amos Seabody—was at Dautrement's 15 minutes; saw How and Burns; thought Burns was tipsy; observed nothing under How's coat; saw How in a chair.

Simeon Heath.—When How came over in the morning, he said the mare he rode had been sick the day before he started from home; the cause he said was, he had been feeding his horses with corn; he said he had some trouble coming over, in consequence of mare's sickness, and much trouble going home; said she laid down.

Stephen Smith—the last witness. How said to his stepson, you know the horse was sick, the latter replied *yes*, but the mare was not mentioned. How said the mare was sick going over to Angelica, and was sick going home; she laid down several times; ascribed it to corn, another time to potatoes, saying he had no grain.

Here the testimony closed, and the case was summed up by Fletcher M. Haight and Felix Tracey, Esqrs. for the prisoner, and John C. Spencer, one of the counsel for

ALLEG'NY,
Feb. 1824.

The People
v.
Dav. D. How.

ALLEG'NY, the people. After an able and impartial charge by Judge
Feb. 1824.

The People
v.
Dav. D. How.

Rochester, the jury retired about two o'clock on Tuesday night, and returned before six on Friday morning with a verdict of guilty. He was sentenced to be hanged on the 19th of March, which sentence was carried into execution. After the sentence, and before the execution, he confessed the murder, as appears by Messrs. Cruger & Wells' report of his case. He tells the story in the following words:

"I shall now describe the MURDER of OTHELLO CHURCH. Yes, in a cool, deliberate manner *I murdered him*!! Called him from his sweet slumbers, and from the bosom of his wife—never more to return to her fond embrace—to sink him in the grave. Yes, his own floor I bathed with his warm blood, and his soul I hurried off to another world. I heard the new-made widow's groans, and the wretched orphan's cries, which pierced my flinty heart. May God forgive me, and wash the crimson stain from my afflicted soul.

"I was aggravated to this crime by injuries, personal abuses, and insults; but they are no excuse for me. I had some time calculated on his destruction, and one day, a few weeks before his death, he went to Angelica, and I expected him to return in the evening. I loaded a gun and way-laid the road between his house and mine, in the woods west of M'Coy's tavern. Here I tarried until late at night, awaiting his return; but he did not come. I first took my stand behind a root, and then, for my better accommodation, behind a large pine tree, and had he come, I surely should have shot him. While I here stood I had some reflections; the sweet evening breeze gently pressed the lofty forest, and the tall pines could bend beneath the power of Heaven—but my obdurate heart remained unmoved.

"The next day I went to Angelica, and there I saw Mr. Church, and I felt very glad he had escaped. After reflecting on the subject, and getting no satisfaction, I fixed my eye on him again, and I could not spare him. Accordingly, in December I watched the state of the snow, that I might not be tracked, and on the 29th I thought the thing was ripe. In the afternoon I loaded a rifle, and placed it in a bed-room where no person slept, and where I could reach it from the window if occasion should require. I then rode to Angelica, four miles east; Mr. Church lived about 6 miles west of my house; I put my horse up at Mr. Sherman's tavern, and fed it. I was about the village until after 10 o'clock at night. At Mr. Dautrement's I drank considerable brandy, and calculated to take as much as I could, and do business regular. I then rode home, stopped at the bars opposite my house, and dismounted, and had serious reflections on the course I was pursuing. After a considerable pause I resolved to go, for I never allowed myself to give back in any undertaking. I then went to the bed-room window, and took out the gun; no one of my family knew it, and rode a smart trot to Church's. I hitched my beast near Mr. Spear's shop—took out my knife and rubbed my flint, that it might not miss fire. I took the mitten from off my right hand, and put it in my pocket. I was careful not to drop any thing whereby I might be detected. I then stepped to his kitchen door, which opened near the head of his bed, and stood 5 or 6 minutes on his door stone. All creation seemed locked in slumber, and one dread silence reigned through all the works of God.

"Now my bold heart even trembled at the thought of an act so desperate, and every vibration of my soul seemed shrinking beneath the horrors of the scene.

ALLEGANY,
Feb. 1824.

The People
v.
Dav. D. How.

ALLEG'NY,
Feb. 1824.

The People.

v.
Dav. D. How.

"I rapped at his door, and shuddered at the very noise I made; and was on the very point of retiring, when his wife, I think, awoke him, and he exclaimed "*Who is there?*" I endeavored to alter my voice, and answered, "*I have a letter for you;*" he then said, "*walk in.*" I answered, "*have the goodness to open the door and take it.*" He arose, and as he opened the door, as soon as I saw the appearance of his white shirt, I shot at venture. I took no sight, and had the gun by my side. I think the muzzle was not more than 3 or 4 feet from him. I then heard him exclaim, "*Oh! my God, my God!!*" I heard no more of him. I then returned to my beast, and every step was marked with care, lest I should fall or lose something, as it was slippery. The shocking cries and shrieks of the family broke the midnight silence, and rent the air with horror, which I heard a considerable distance. I then rode with great speed home. I dismounted and loaded my gun in haste, and set it into the window whence I had taken it; then I put out my beast, went to bed and went asleep. Before day the neighbours of Mr. Church called on me, and informed me he was murdered in his own house."

MUNICIPAL COURT.

BOSTON, MARCH, 1824.

The Commonwealth

v.

Joseph T. Buckingham,

} LIBEL.

Truth, when
may be given
in evidence or
injustification
or to rebut the
presumption
of malice, on
indictment for
libel.

Present—Hon. *Peter O. Thatcher.*

James F. Austin, Esq. counsel for the commonwealth.

Hon. Benjamin Gorham and *S. L. Knapp*, Esqrs. counsel for the defendant.

The defendant was charged in an indictment for a libel found by the grand jury, for publishing in the New-England Galaxy of November 7th, 1823, the following article:

BOSTON,
March, 1824.

Commonwealth
v.
Buckingham.

"RECORD OF FASHION. The pupils of Messrs. Parks and Labasse gave a splendid exhibition of dancing at Concert Hall on Tuesday evening. The elegance of attitude and the gracefulness and ease of their movements afforded a proof of the science, skill, and taste of their instructors, and elicited the approbation of a crowded and fashionable concourse of spectators.

"A communication respecting this exhibition and ball has been received, the chief object of which is to give the details of an unpleasant and disgraceful disturbance which occurred in the course of the evening. The *history* would not do much honour to the parties concerned, and we decline its publication at present, though it is but just to the character of Mr. Parks, to say that we have not heard that any blame was attached to *his* conduct on the occasion, but that, on the contrary, he kept as much aloof as possible from the scene of anger and confusion.

"The rugged Russian bear, it is said, was a conspicuous actor in the *farce*, which had well nigh turned out to be a *tragi-comedy*, in consequence of his attempting to jump, with his cocked hat and all, down the throat of one of his opponents. We think, with our correspondent, that it is best, at the present moment, to give no opinion on the *merits of the controversy*, but leave it to the decision and final adjudication of him, who, while acting as the representative of the greatest monarch in the world—the magnanimous Alexander, the autocrat of all the Russias, the honorary member of the Massachusetts Peace Society, the grand pacificator of Europe—does not deem it a derogation from the dignity of his high vocation, to

BOSTON,
March, 1824.

Com'wealth
v.
Buckingham.

become a party in the quarrels of dancing masters and fiddlers."

The indictment consisted of two counts, in both of which the whole article was recited, with inuendoes and averments in the usual form. The first count alleged that the defendant, in the publication complained of, intended maliciously to defame, vilify and scandalize Alexis Eustaphie, and hold him up to the contempt and ridicule of the public. The second alleged, that the defendant maliciously libelled the said Alexis Eustaphie, with intent to destroy his reputation, and thereby deprive him of the emoluments of his office, as consul of the emperor of all the Russias.

James T. Austin, Esq. in opening the case to the jury, remarked, that the indictment was founded on a certain piece, published in the *New-England Galaxy*, which formed the basis of a third count in an indictment found by the grand jury at a former term of the court, but which was found to contain an informality, which excluded it from trial. It had passed again through the hands of the grand jury, and he trusted there was no fatal deficiency of technical formality. It had no connection now, however, with the other counts in that indictment, and was to be tried without any reference to any of the publications that were the subject of the former trial. There were three points for the jury to consider. First, whether the defendant published the piece as set forth in the indictment. Secondly, whether Alexis Eustaphie, the Russian consul, was the person to whom the piece was intended to apply. And thirdly, whether the piece was in itself libellous. On the first point, it was not necessary to exercise the patience of the court and jury, for

defendant admitted that he published the paper containing the article complained of.

BOSTON,
March, 1824.

As to the second and third questions for the consideration of the jury, Mr. Austin remarked, that it could not be doubted that the piece was libellous, and explained to them very briefly the nature of libels, and why they were considered as breaches of the peace. If the jury should find that the piece which had been read to them was a libel, and that the Russian consul was the person alluded to, as was averred in the indictment, the defendant must be pronounced guilty.

Com'wealth
v.
Buckingham.

Johnson S. Ellery, who, being sworn, testified, that Alexis Eustaphie was the accredited consul of the Russian emperor, residing in Massachusetts; that he had been so for fourteen years; that he (Eustaphie) was at the ball at Concert-Hall on the Tuesday evening preceding the 7th of November, and behaved with the utmost propriety; that there was no other person at the ball, to whom the remarks could apply. He admitted that the consul endeavored to act as a mediator; some of the persons with whom the disturbance originated being foreigners, and unacquainted with our language, they called upon him (the consul) to translate and explain, and he entered into the quarrel no farther than the business of translation or explanation rendered proper and necessary. He farther stated, that the defendant, in a conversation with him (Ellery) on the 13th of January last, acknowledged that the consul was the person for whom the application was intended. On being questioned by defendant's counsel, Mr. Ellery would not testify to the precise words used by defendant, but was positive that the personal application was admitted. He stated that he called on the defendant at defendant's office, on the

BOSTON,
March, 1824.

Com'wealth

v.
Buckingham.

day aforesaid, intending to act as a peace-maker, and endeavour, if possible, to effect a reconciliation of all differences between the consul and defendant; that Mr. Coolidge went with him, at his request, to defendant's office; that he told the defendant, that the consul was desirous of stopping all farther proceedings, and that he thought defendant ought to meet these pacific overtures with a correspondent disposition, and manifest his good feelings by publishing some kind of an apology to soothe the wounded feelings of the consul; that he had written an apology, which he showed defendant, and thought he ought to publish it.

The defendant produced a paper, of which the following is a copy, which Mr. Ellery admitted to be that which he presented for publication.

"In justice to ourselves we cannot but express our sincere regret that any thing should have appeared in the *Galaxy* to wound the feelings, or reflect on the character of Mr. Eustaphie, a gentleman for whom we have the highest respect, and whose conduct, both private and public, we believe to be irreproachable. Inadvertency, absence from home, and the abuse of our confidence by correspondents, with whose motives we were not acquainted, must be our apology. We wish to be understood as including within the above explanation the article dated November 7, 1823, charging the consul with undignified deportment at the ball at Concert-Hall, as, on subsequent information (not having been present ourselves) we *are assured* the statement is altogether unfounded."

Mr. Ellery then stated that defendant declined publishing this apology, but said he would publish something similar in substance, but in language of his own; and that he accordingly wrote a few lines, and expressed a willingness to publish them, but which he (Ellery) thought would not be sufficient, but would make the matter worse, and be adding insult to injury. He stated that, as nearly as

he could recollect the substance of what defendant wrote, it was, that as there were contradictory accounts of the transactions at Concert Hall, on the evening of the exhibition, some gentlemen declaring that there was nothing improper in the conduct of the consul, and others, of equal respectability and veracity, maintaining the contrary, it was not for him, (defendant) to decide, or to reconcile the contradiction.

BOSTON,
March, 1824.
Com'wealth
v.
Buckingham.

Question by defendant. Did I not assign to you as a reason for refusing to publish the piece you presented, that, if published, it would amount to a declaration of my disbelief in the representations of men of veracity, or that, in other words, it would be charging them directly with falsehood?

The witness admitted that was the reason given for the refusal.

S. L. Knapp, Esq. opened the defence, in which it was contended that the piece was not, in its nature, libellous; and that, if it were so, it was not a libel on the consul. The quotation, "the rugged Russian bear," was no more a designation of him, than it was of any other Russian; that it was no more libellous to make use of it in the manner in which defendant used it, then the terms Yankee, John Bull, or Nic Frog, when applied to one of our own citizens, and Englishman, or a Frenchman. He contended that the Russian consul should not be identified with the description in the paper. The piece spoke of the representative of the autocrat of all the Russias. Mr. Eustaphieve was not such a representative. He was a consul, a mere commercial agent. If the description answered to that of any person, it was the Russian minister, Baron *Tieul*, and it was he, if any one, that was libelled. But there was no libel. The piece did not

BOSTON,
March, 1824.

Com'wealth
v.
Buckingham.

describe Mr. Eustaphieve, and the person whom it did describe, in part, was not present. The piece could not be considered a libel. It was an account of an occurrence which took place at a public ball, given at a well-known licensed tavern. An exhibition of dancing had been proposed; the attention of the public had been invited to it by advertisements in the newspapers; tickets were sold to admit the bearer; and the exhibition was as fair a subject of remark and criticism as the entertainments at the theatre. An unpleasant and disgraceful disturbance or quarrel took place at this exhibition; and if it were libellous to give the particulars of the quarrel, and to comment thereon, he saw no reason why it was not libellous to publish an account of a riot in the street. If this were a libel, hundreds of libels were published every week, and no editor of a newspaper could escape from a prosecution. He urged that this piece wanted the principal ingredient to constitute a libel: There was no malice in it. Mr. Ellery, the witness for the prosecution, had stated on the stand, that the defendant had disclaimed all malice and personal animosity, and had declared his willingness to publish any thing that he could in honour publish, to soothe the lacerated feelings of the consul. He did not, it is true, publish the apology presented to him by Mr. Ellery. He did right in refusing to publish it. Had he done so, he would have met, and justly met, the contempt of the public. I, said Mr. K. should have despised him, and so would every man of high-minded and honourable feeling. He acted as every prudent and honest man would act, and did not meanly endeavour to get out of a small difficulty, by getting into a worse one. The facts which he stated in the paper were communicated to him by men of respectability and

veracity, and he did not choose, for the sake of conciliation, however much he might desire it, to say that he disbelieved such men. He acted wisely and properly, in refusing to decide which of the parties was guilty of falsehood. Mr. Knapp said he expected to be able to prove that the Russian consul took an active part in the disturbance at the exhibition, and that, if he interfered merely as a translator, he did it with so much earnestness and zeal, as led the spectators generally to disbelieve that he felt a strong interest in the success of one of the parties. He concluded by remarking, that it was necessary for the defendant to show that the occurrences took place, substantially, as he had stated in the paper, in order to rebut the charge of malice; and for that purpose he should call sundry witnesses.

BOSTON,
March, 1824.

Com'wealth
v.
Buckingham.

The defendant wished before the case proceeded any farther, to call a witness who heard the conversation with Mr. Ellery, at his office, in order to show more particularly to the court and jury, why he refused to publish the apology. He called

Cornelius Coolidge, who, being sworn, testified substantially to the conversation at defendant's office, as stated by Mr. Ellery.

Question by Defendant. Was it not stated by me, to Mr. Ellery, that I was unacquainted with the Russian consul, had never spoken to him, that I indulged no personal animosity, and was perfectly ready to meet him on amicable terms?

Answered affirmatively.

Question by Defendant. Did not Mr. Ellery appear to be satisfied that there was no malice on my part, and that I was willing to make any arrangement for the settlement of the difficulty that could be made without exposing me to the charge of inconsistency and duplicity?

Answer. I do not recollect distinctly, but my impression is that you discovered a wish to have all differences adjusted.

Defendant. Mr. Ellery stated to me, in your presence, Mr. Coolidge, that the consul had some cause to regret what

BOSTON,
March, 1824.

Com'wealth.

v.

Buckingham.

had taken place; he was satisfied that I did not indulge any malicious or ungentlemanly feelings towards him, and that I had been deceived by correspondents; he was even sorry that the jury had convicted me on any part of the indictment which had just been tried; he was willing to use all his influence with the court to prevent the sentence from extending farther than to a fine merely nominal, if I would publish the apology. In reply, I said to Mr. Ellery that I thought it best to let the matter rest till the sentence of the court should be known; that if, in consequence of his interference with the judge and county attorney, the sentence should be merely nominal, I should think myself bound to say so, and to say every thing else, that could be said with justice in his favour; but that I thought this a bargain for payment in advance, for what it was by no means certain the consul could accomplish; for he could have no control over the sentence of the court. I appeal to you, Mr. Coolidge, if this be not the fact.

Mr. Coolidge could not recollect, *positively*, but he believed it to be substantially true.

The defendant was then about to call witnesses to testify as to what occurred at Concert Hall, at the exhibition alluded to.

The counsel for the Commonwealth objected.

Hon. *B. Gorham*, senior counsel for the defendant, replied to the arguments of the county attorney. He did not wish to introduce the testimony as a justification. He agreed with him that the law, as it now stands, does not allow the defendant to prove the truth of the charges as a justification. But he wished to introduce this testimony to repel the charge of malice, and then leave it to the jury to decide whether it were a justification or not. Mr. Gorham stated that he considered the principles of the law, which he supported with a variety of illustrations, all tending to show that the right of the defendant for which he now contended had been recognized in a great number of decisions, both in England and America. The law thus settled enabled the jury to judge of the law as well as the fact. But how could the jury be judges of facts,

when all facts were excluded from the trial † as they would be in this case, if the defendant were not permitted to show that there was a disturbance, and that the Russian consul took a part in it.

BOSTON,
March, 1894.

Commonwealth
v.
Buckingham.

*The opinion of the judge on the motion of the defendant's counsel to give in evidence the circumstances which occurred at Concert Hall.**

"The defendant offers to prove that the publication in this case was for a justifiable purpose, and not a malicious attempt to defame, by showing the circumstances which occurred at the time. Had the attorney for the commonwealth instituted an inquiry, as to the deportment of the Russian consul at the exhibition alluded to, which under the averments in the indictment might have been done, I should have felt bound to let in all the testimony to this point, which either party could have brought forward. But no evidence of this kind has been offered on the part of the government. Nor is it material to the issue to be tried, what the deportment of that gentleman was upon that occasion, it being a just and legal presumption, that he did behave at the time with propriety, and according to his rank and station.

"The learned counsel for the defendant do not offer the evidence of the occurrences of the evening as a *justification* of the libel, because they admit that, by the law of this Commonwealth, 'the truth of the libellous words is no justification in a criminal prosecution for a libel.'— But they contend, that this evidence ought to be received, to rebut the presumption of malice. But if this evidence should be received in this case, I think it would go very far to evade the general rule, 'that a defendant cannot justify himself for publishing a libel, merely by

* This learned and valuable decision upon the admissibility of truth in evidence on indictment for libels, and the charge to the jury, were forwarded to me by his Honor Judge Thacher, at my request. I am certainly much gratified to acknowledge it.

BOSTON,
March, 1824.


Com'wealth
v.
Buckingham.

proving the truth of the publication : ' for, under whatever circumstances it is received, the use which he would make of such evidence to the jury would be, to justify the publication.

"Before a defendant can be admitted to this evidence, he must prove "that the publication was for a justifiable purpose, and not malicious, nor with intent to defame any man." (Clapp's Case, 4 Mass. R. 163.) If a piece complained of appears to be a friendly admonition from a father to his son on his supposed misconduct; or the testimony of a witness given in a court of justice; or a character given of a servant; the purpose thus appearing to be justifiable, and not malicious, the party would be entitled to prove the truth of the matter in justification. Or it may be apparent, *that the public has an interest in the publication*, on account of the *individual* concerned, or of the *subject matter*. The individual may be a public officer, or a candidate for a public office, and the piece may relate to the public service. It may be a petition or remonstrance to the government, complaining of some stretch of authority, or of some illegal act, in some one of its branches, as in the famous petition of the Seven Bishops to James II. remonstrating against his proclamation, granting unlimited toleration, and suspending all laws relative to tests, papists and others. (12 State Trials, Howell's ed. Trial of the Seven Bishops, 183.) It may relate to one who has been convicted in the due course of public justice of an infamous crime; in which case, society should be put on its guard against his future machinations. Or it may relate to one charged with an infamous crime, as murder, burglary, or swindling for instance, and who may have fled from justice. The public may in such case be properly called on, by advertisement or otherwise, to assist in arresting the fugi-

tive, it being for the good of society that offenders should not escape punishment. In such, and in all similar cases, where a good intent appears on the face of the publication, evidence of the truth of the fact is admissible, to rebut the charge of malice.

BOSTON.
March, 1824.

Commonwealth
v.
Buckingham.

"The decision of the present motion must depend on the question, whether the public appears to have such an interest in this case as to warrant the inquiry.

"The subject of the piece is 'an unpleasant and disgraceful disturbance,' as it is called, which occurred at an exhibition ball given at Concert Hall in this city. If it was of a public nature, and the community had an interest in it, it was because of *the occasion*, or of *the place*. The occasion was a voluntary assemblage of persons for the amusement of dancing; the place was a licensed inn. Now I would ask, what interest had the public in the details of this scene? If any crime was committed there, it may be investigated like other crimes, committed in any other place. Suppose that an individual had intruded himself improperly into the company, or had forfeited his right to continue there by any improper conduct: The managers, after requesting him to retire, and after his refusal, might have turned him out by force, leaving it to him, if he considered himself injured, to bring his action for redress. If there was any disorder, which was not the subject of legal redress or inquiry; if any one, for example, acted in a manner unbecoming his character as a gentleman, or his rank and standing in society; let such individual suffer the natural consequence of his conduct in the silent loss of reputation. But I do not know that the public had such an interest in it as that it called for, or would justify, a libellous piece in a newspaper.

BOSTON,
March, 1824.

Com'wealth
v.
Buckingham.

"If we should now institute an inquiry into all the circumstances which occurred at this ball, one manifest inconvenience would arise. There were present between two and three hundred persons, ladies, gentlemen, and children. We cannot limit our inquiry to what was said and done by Mr. Eustaphieve. It will be equally proper and necessary to inquire, what was said and done by each individual who was present. Because the scene consists of all that was said and of all that was done by each at the time. Now, it is said in the piece, that there was a *disgraceful disturbance*, the history of which *would not do honor to the parties concerned*. Who is to be disgraced is wholly uncertain. But it is apparent, that the conduct of two hundred individuals, who are not on trial, who are not present, who have no notice of the question, and whose reputation may be affected by the inquiry, would, in this way, and without any legal necessity, be made a subject of solemn investigation in a court of justice. I am of opinion, that such inquiry would shock the good sense even of persons not learned in the law; much more would it offend the legal discernment of all, who are acquainted with its humane and wise principles.

"I take it to be clear law," says Bayley, J. in the trial of Sir Francis Burdett, (4 Barn. and Alderson, 324.) 'that if a libel contain matters imputing to another a crime capable of being proved'—(and I think the rule equally extends to a libel imputing to another disgraceful conduct)—'you are not at liberty at the time of the trial to give evidence of the truth of those imputations. And this is founded on a wise, wholesome, and merciful rule of law; for if a party has committed such an offence, he ought to be brought to trial fairly, and with-

out any prejudice previously raised in the minds of the public and the jury. The proper course, therefore, is to institute direct proceedings against him, and not to try the truth of his guilt or innocence behind his back, in a collateral issue to which he is no party.

BOSTON,
March, 1894.

Com'wealth
v.
Buckingham.

"The indictment against Sir Francis Burdett was for a seditious libel, in which he was charged with attempting to excite discontent among the subjects and soldiers of the King, and to inspire in them hatred of the government. In the libel, he represented, that divers subjects of the king, men and women, had been inhumanly cut down by the dragoons at Manchester. The defendant offered, at the trial, to prove the truth of the allegation, or, in other words, the circumstances which occurred at the time. But the evidence was rejected; and the judges of the King's Bench, although they differed on other points of law, which had been decided at the trial, yet they unanimously approved the rejection of this evidence. And even after the conviction of that defendant, when brought up to receive judgment, affidavits offered in mitigation of the sentence, containing proof of the facts charged in the piece, were refused by the whole court; because they said, if affidavits are admitted on one side, they must be admitted also on the other, and so the court would incidentally try individuals for a crime who were not on trial.

"This decision applies, in principle, to the present question. If we should go into this investigation, we should, in reality, be trying individuals for *disgraceful conduct*, when those individuals are not on trial. And as nothing is more clear to my mind, than that the character of an individual may not be attacked except in a court of jus-

BOSTON,
March, 1824.

Com'wealth.

v.
Buckingham.

tice, after due notice, and a fair opportunity to defend himself; and as the public has no interest in the inquiry, the evidence which is now offered on the part of the defendant is rejected."

Mr. Gorham, in closing the case on the part of the defendant, very briefly commented on the course which had been pursued by the prosecutor, and the unprofitableness of contending when the testimony necessary for a defence was excluded. In prosecutions for libels it was necessary to charge the defendant with malice, in order to constitute a crime. How was he to meet this charge, unless he could be permitted to go so far into the facts, as to show that the publication was an account of actual occurrences, and then let the jury judge whether there were malice in it? If his intention was merely to give, in the ordinary course of his profession as an editor, the substance of a quarrel which happened at a public tavern, his motive was not malicious; and there was no way of showing to the jury that it was not malicious, but by showing them that his publication was what it purported to be. If the publication, on which the indictment was founded, were a libel, then it is almost impossible to look into a newspaper without finding a libel. It is libellous to state that a quarrel took place between two persons in the street, because it is derogatory to the character of gentlemen to be concerned in quarrels. Governor Brooks, who issued a proclamation, offering a reward for the apprehension of Michael Powers, suspected of the murder of Kennedy, and all the printers who published that proclamation were guilty of libels; and if Powers could have applied to a grand jury, before his apprehension, and entered a complaint they would have been bound to find a bill of indictment, and the

jury would have been bound to find them guilty, if they were not permitted to produce facts to show the motive for the proclamation; and they could not be permitted to do so, under the doctrine now set up by the court. He mentioned several other supposed and real cases to illustrate the position, that it was impossible for any defendant to get clear of an indictment, without going into the facts of the case—not to justify the publication, but to show the intent, and to repel the charge of malice, which is a necessary ingredient in a libel. He thought, however, in this case, that the publication itself indicated no malice on the part of the defendant. The paper, and the conversation which had been related as having taken place at the defendant's office, were all he had to submit to the jury, and he wished them to recollect the testimony of Mr. Ellery and Mr. Coolidge, which exonerated him completely from the charge of malice. It must appear evident, that the prosecution would never have been renewed had the defendant published an apology, which he could not conscientiously publish. If there were any malice or vindictiveness exhibited, it was not by the defendant. He confidently expected a verdict of acquittal.

BOSTON,
March, 1894.

Com'wealth
v.
Buckingham.

Mr. Austin closed on the part of the prosecution. He remarked, that it was difficult for a public prosecutor to pursue a course that should, at the same time, satisfy all the parties concerned. Those who came with their complaints were very much disposed to think he did not do enough: and those, whom, as an officer of the government, it was his duty to prosecute, very naturally thought he did too much. He should, therefore, without being influenced by either of these parties, endeavour to please a third—he should endeavour to please himself. He

BOSTON,
March, 1894.

Commonwealth
v.
Buckingham.

should follow the course, which the law, according to his understanding and best judgment, pointed out. In the course of his argument he remarked, that the term malice, as used in the indictment, did not signify ill will, or a deliberate intention to do an injury; but that the libel was published knowingly—that the defendant knew of the publication, and issued it of his own free-will, without compulsion. As to the apology which had been spoken of, Mr. Austin would not say that it was just such a one as he would have advised the defendant to publish; and he submitted to the jury whether the substitute which was offered, according to the account given of it by the witnesses, was such as an honorable man would accept.

CHARGE TO THE JURY.

You perceive, gentlemen, that this is a charge against the defendant, for publishing a malicious libel on the character and conduct of Alexis Eustaphiev, a consul of his Imperial Russian Majesty, duly accredited, and residing in this city. The intent alleged is, that it was with design to injure and vilify him as well in his office, as in his general good name and estimation, and to have it believed, that he had, upon a certain occasion, conducted himself in a disgraceful manner.

The indictment contains a second count, in which the same piece is charged to have been published by the defendant, with the design, that it should be believed, that the Russian consul had conducted, upon a certain occasion, in a manner unworthy of his office and station of consul, by engaging in brawls and quarrels with persons of low character, and that it should be believed, that he was unworthy to hold and sustain that office and station.

If the piece complained of should not in your estimation be a libel; if the defendant did not publish it; or if it does not relate to the Russian consul, the defendant must be acquitted: and although you should be satisfied of these several facts, yet, as the essence of the crime consists in malice, if you should find that the act of the defendant was free from this quality, he must be acquitted.

BOSTON,
March, 1824.

Com'wealth
v.
Buckingham.

But it is not necessary that you should be satisfied that the piece was published with all the evil motives which are alleged in the indictment. If you should believe that the libel was designed to vilify the Russian consul as an individual only, and to bring him into contempt and hatred, you will find a verdict against the defendant on the first count only. But if you should believe that it was published with the malicious design to injure the Russian consul in his office also, and to cause it to be believed that he was unworthy to retain it, then it will be your duty to find a general verdict. And if, after a full review of the case, the guilt of the defendant should remain doubtful, that doubt is to operate in favour of his innocence; and you are to weigh his conduct in the judgment of charity, by that golden rule, which we should wish, in like circumstances, should be applied to our own actions.

The fact of publication is admitted by the defendant; and in an interview with Mr. Ellery, he confessed that the piece was intended to apply to the Russian consul.

"The technical definition of the crime of libel is, that it is an excitement to a breach of the peace by means of a written instrument containing matter injurious to the fame and character of another." (4 Barn. and

BOSTON,
March, 1824.

Com'wealth
v.
Buckingham.

Alderson, 112.) This definition is well enough, and will guide you in forming your verdict. The piece begins with paying a compliment to the performances of the pupils and to the ability of their instructors. It proceeds to speak of a communication, which the editor had received, giving the details of "an unpleasant and disgraceful disturbance," which occurred in the course of the evening, "the history of which would not do honour to the parties concerned." So that the writer was upon a subject of delicacy, affecting the character of other persons. Mr. Eustaphieve is then introduced under the description of the "Rugged Russian Bear," as being "a conspicuous actor in the *farce*, which had well-nigh turned out to be a *tragi-comedy*, in consequence of his attempting to jump, with his cocked hat and all, down the throat of one of his opponents." He then agrees with his correspondent, that it was best to give no opinion on the merits of the controversy, but to leave it to the decision of him "who, while acting as the representative of the greatest monarch in the world, the magnanimous Alexander, the autocrat of all the Russias, &c. does not deem it a derogation from the dignity of his high vocation, to become a party in the quarrels of dancing masters and fiddlers:" thus bringing the details of this scene into direct connexion with the office which he held, and asserting, that though Mr. Eustaphieve was the representative of the Emperor Alexander, he did yet condescend to engage in the quarrels of dancing masters and fiddlers.

Whether this piece has the tendency to degrade the Russian consul in public estimation as a man, and to affect his standing in his office, it is for you, gentlemen, to judge. Consuls are persons appointed by the sovereign of a state, to reside in foreign ports, for the purpose of taking care of the commercial interests of his subjects, transacting business there. They are usually persons of

known probity and commercial intelligence, and are required to understand not only the laws and rights of their own country, but the laws and customs of the place where they are to reside. It is their duty to aid and protect their fellow subjects, and to advise and assist them in all cases, wherein their right or interest may be concerned. The affairs of trade, and the interests, rights, and privileges of merchants and seamen in foreign countries, are ordinarily left to the conduct of their consuls. It is expected of them, that they correspond with the ambassador from their respective sovereigns to the government of the country within which they are stationed, and that they should send to him information of any transactions, which may affect the political or commercial interests of their own country. And in case no ambassador or other public minister from their sovereign should reside at the time in the country, they are to transmit their letters directly home to their government. Though a consul be a public minister under the protection of the law of nations, he yet enjoys some important privileges annexed to his office, which distinguish him from the private inhabitants of the place where he resides. So that you perceive that, from their situation, consuls are officers of honour and trust; that it is in their power to do much good or harm; and even to affect the relations of friendly countries; and hence arises the importance, that they should be honourable men, and that they should support the dignity of their station, by their grave and prudent deportment.

Now consider whether, to represent an individual who holds an office of this kind as guilty of disgraceful conduct, and engaging in the quarrels of dancing masters and fiddlers, is not injurious to his fame and character,

BOSTON,
March, 1834.

Com'wealth
v.
Buckingham.

BOSTON.
March, 1824.

Com'wealth
v.
Buckingham.

In common with all other citizens, Mr. Eustaphieve is entitled to be protected from unlawful attempts to render him an object of odium or contempt. In rendering him such, you will consider, whether his official character will not be sacrificed. It is not to be supposed that his government will retain an officer in a station of confidence and responsibility, if he should not maintain a character becoming that station. So that it is not foreign to your duty to inquire, whether the piece complained of has that tendency; and if it has, whether it will not also tend to provoke him and his friends to acts of revenge, and so to a breach of the peace, which is the definition of the offence.

Here you will recollect the construction which the counsel for the defendant have put on this piece. They say, with truth it contains no charge of official misconduct, nor any imputation on the moral character of the Russian consul. They also say, it is harmless, sportive wit, which a wise man would disregard; and they insist, that no good comes from prosecutions of this description. They call upon you, farther, to give to the words the most favourable sense, and it is your duty to do so; but you are not to violate your understanding, by giving to the words any signification which is not consistent with sound sense and the common meaning of the language.

You will next inquire, if the intent of the defendant in publishing this piece was malicious; and if you find that it was done deliberately and wilfully, and that he neglected a favourable opportunity to redress the injury, it will be evidence of malice. To this point, the testimony of Mr. Ellery is material. He testifies, that some time in January last, he, as a friend of the Russian consul, called on the defendant, and informed him that this

piece had greatly wounded the feelings of that gentleman, and that he was apprehensive, it would tend to injure him with his government. To this the defendant replied, that he bore no ill will to the Russian consul, and had no acquaintance with him; that he had no knowledge of the circumstances of the transaction, but that he had written the piece in consequence of a communication, which had been sent to him on the subject. Mr. Ellery then proposed to the defendant, to publish an apology, that the redress might be as public as the injury. The defendant declined publishing one which Mr. Ellery had written, and wrote one himself, which he was willing to publish. The substance of this was, that as many respectable persons had declared there was nothing improper in the conduct of the consul, and others equally respectable maintained the contrary, it was not for him to decide the matter. For my part, I regret that this negotiation was not more successful; and I think it is to be lamented, that when the defendant wrote this piece, it had not occurred to his prudence, that, possibly he was about to inflict a severe wound in the breast of a man, who, he says, had never injured him, and against whom, he declares, neither at that time, nor at any other, had he entertained any malice.

BOSTON,
March, 1824.
Com'wealth
v.
Buckingham,

Gentlemen, with the scene at Concert Hall you have no concern at this time. If any riot was committed there, let those who were engaged in it be presented according to law. If the Russian consul committed any offence against the laws, or against good manners, he is liable to legal animadversion, and he will derive no protection from his official station. But let it not be understood, that the printer of a newspaper may publish a piece, calculated to bring that gentleman into contempt.

BOSTON,
March, 1824.

Com'wealth

v.
Buckingham.

with us and to destroy him with his own government, without trial, and without opportunity to be heard in his own defence.

We do not hold our characters in this Commonwealth at the mercy of the printers of any newspaper. A citizen may not be charged with any disgraceful or flagitious conduct, affecting his good name, his standing in society, or his employment, except before the judicial tribunals of the country, where he may be heard in his defence, and tried according to the established rules of law.

That the law of libel is ancient, and dates from a period beyond that of newspapers, is no reason, in my opinion, for relaxing its principles. The printer of a newspaper has power in proportion to his talents, to the interest which he excites, and to the diffusion of his publication. Who is the perfect man that may not by the eloquent and ingenious satirist be placed in an uncomfortable situation? What is there, of all that is sacred and venerable, that has not been exposed to the shafts of ridicule? And if, whenever we open a newspaper, we are to expect to find some extravagant representation of ourselves, or of our neighbours, something caricatured either of praise or blame; who that is conscious of the defects, which are incident to the human character, would wish to live in such a society.

While all protection and encouragement are to be given to the directors of the press, in diffusing intelligence, in imparting instruction, and in the free discussion of all truths affecting religion, morals, government, and whatever concerns human happiness; there is a limit beyond which, if they pass, it must be known that they violate the law. Whether this is one of those cases, is left to your judgment to decide.

The jury brought in a verdict of guilty on the first count, and not guilty on the second. At the request of the defendant, the court then pronounced sentence, which was, that he should *be imprisoned thirty days in the common jail, and pay the costs of prosecution.*

BOSTON,
March, 1824.
Com'wealth
v.
Buckingham.

CIRCUIT COURT U. S.

NEW YORK, APRIL, 1824.

Present—Hon. *Smith Thompson*, Justice.

United States

v.

Tom Jones, alias Robinson.

MURDER.

Robert Tillotson, Esq., District Attorney.

Pierre C. Van Wyk and *Charles G. Haines, Esqrs.*,
Counsel for the prisoner.

Mr. Tillotson opened the case on the part of the United States, and presented to the jury the outlines of the evidence which would be adduced. He said the murder was committed on the high seas, in 1818. The brig *Holkar* sailed from the port of N. Y. in Oct. 1818, under Captain Brown, and a coloured crew, with the exception of one man. The brig sailed for Curacoa, and reached the port of her destination. She took in a return cargo; and while on the high seas, the crew rose, mutinied, and murdered Captain Brown, the mate of the vessel, and a Captain Humphreys, who was a passenger on board. The District Attorney stated the difficulties in procuring testimony, after a lapse of six years, but said that he should present every thing that could be reached.

A witness who has been convicted of felony and suffered the judgment of the law, (by serving out the time for which he was sentenced in the State Prison) may any time afterwards be restored to competency by a pardon. No credit, however, is to be given to his testimony unless corroborated by the testimony of others or by the circumstance

NEW YORK
March, 1824.

The People
v.
Tom Jones.

of the case.

Weight of
circumstantial
evidence. (See
the judge's
charge and the
note at the end
of the case.)

EVIDENCE ON THE PART OF THE STATE.

He then called *Thomas M' Cready*, who is a clerk in the Custom House. Witness produced the register of the *Holkar*, which has never been surrendered, dated March 5, 1818. The vessel cleared for Curacao, October 18, 1818. She was an American vessel, owned by Richard Cole, and Samuel Brown was the master. The list of the crew was produced and read—an objection to the reading having been overruled by the court. The name of the prisoner at the bar was entered *John Robinson*.

John G. Bogart, proved the notarial list, which corresponded with the entry in his register. He shipped the crew, but could not identify the prisoner at the bar, although he had some recollection of his face.

Joseph Lyon had some property coming home in the *Holkar* when she left Curacao, but he had never been on board of her. The property was insured by the Mercantile Insurance Company, who paid the amount insured, to Mills, Milton, & Company, to whom it had been made over a few months after the loss of the *Holkar*. There was no suit against the Company.

James Flynn, one of the branch pilots, knew Captain Brown before he commanded the *Holkar*. He was a stout square man, about 5 feet 9, with large black whiskers. Two of his front upper teeth projected beyond his lip, which gave him a very peculiar appearance. Has never seen him since he left in the *Holkar*, on Sunday morning, October 18, 1818. He has no recollection of the prisoner. All the crew were black excepting the mate. If there was any other, he was of a copper or dark colour.

Diana Valentine.—Witness remembers the brig *Holkar*—her husband shipped part of the crew; does not know exactly when, but thinks it was about five years ago. Her husband kept a sailor's boarding house at 63 Bancker street. It was in the fall of the year, and the *Holkar* sailed on Sunday morning: does not know the name of the captain; he was a stout man with large heavy whiskers; one of his teeth projected out, but does not know whether it was his upper or lower tooth: remembers that her husband shipped the prisoner at the bar, and a man by the name of Harry Cook: the prisoner went by the name of *Tom Jones*; he did not board there, but was at the house a great deal. The brig lay at the time at the left hand side of Dover street wharf.

Was on the wharf at the time she sailed, and saw Mr. Conklin and Mr. Spence; did not see the prisoner again for three years. (Witness went up to the prisoner to see him, has no doubt that he is the man shipped by her husband.) Captain Cole commanded the brig before Captain Brown.

NEW YORK
March, 1824.
The People
v.
Tom Jones

Cross-examined by Counsel for prisoner.—Has lived in Bancker street for six years, does not know Oliver King. Saw the prisoner two or three days before Johnson was hanged, in the street, and was well acquainted with her. The day before Johnson was hung, Mr. Conklin came for witness to come and see if it was the man; did not remember that he was on board the Holkar till re-minded of it by the cook. Her first husband's name was John Thompson; knows that one of captain Brown's teeth was out; remembered that it was on Sunday the Holkar sailed. Harry Cook called him Tom Jones, on board the Holkar; saw him three or four times since; can't say Oliver King shipped on board Holkar; four years since she saw Oliver King. About three years ago saw Jones, and spoke to him; had heard that that the Holkar was lost, but he did not strike her as being one of the men on board; Harry Cook was a large stout man.

Mr. Bogart called again. A man by the name of John Thompson shipped the prisoner: recollects that Thompson became security for the prisoner, 16th October, 1818, and received his advance, as appears by his register. The crew were all coloured. Knew Captain Brown, does not recollect any thing about his person, only that he was a large man.

Azel Conklin, (one of the city constables) was on the wharf on Sunday morning, when the Holkar sailed, and remembers that the crew consisted of coloured people. Does not know Captain Brown; he was a stout portly man, he was pointed out to the witness as being the captain—black hair and large whiskers. Knew John Thompson, and has often seen Diana—thinks she was on the wharf at the time; knows that Thompson shipped some of the crew, was told so by him. Happened to be passing at the time and remembers remarking:—"I should not like to go to sea with that crew."

Cross-examined.—Bancker street was of a very bad character; has very often to go to that street to look for rogues, &c. but had never heard any thing against the house of Thompson.

Peter Wills knows that the prisoner shipped on board the Holkar: he got Mr. Thompson to ship him; saw him on

NEW YORK
March, 1824.

The People
v.
Tom Jones.

board when the brig sailed, and believes it was Sunday; was at the wharf when the brig sailed, saw prisoner and Oliver King on board; remembers it; did not know Captain Brown.

Cross-examined.—Lives in Leonard street, and lived at the time in Catharine street; went up to Mr. Thompson and got three dollars; and he then went with him and prisoner to the brig. Is sure he is the man; has been acquainted with him ten years. He used to board with Henry Parsons. Witness goes to sea off and on; arrived from France, August 29th last. About four or five weeks ago witness saw prisoner in Bancker street, knew him as soon as he saw him; called him Tom Jones, and shook hands with him; had heard of the Holkar being lost, said nothing to him about it, as soon as he saw him he remembered it. Saw King the same day, and next day heard he was taken up. Never had any quarrel with the man; when he was living in the house with the prisoner he missed seven dollars, and thought hard of the prisoner, but had no quarrel about it. Witness was never taken up for any thing but assault and battery; and buying a fiddle; was acquitted; has been in Bride-well two or three times; saw prisoner two or three days before he was taken and knew him; the prisoner first knew him; shook hands, called him Tom Jones, asked him where he came from, he answered from the southward.

Julia Freeman.—Had known the prisoner five or six years ago. Three or four weeks ago, Jones called on her and asked her if she did not recollect him, as having staid with her sister. He called himself Thomas Jones. Her sister's name is Mary Adams, who lived in Bancker street. He has not staid with her sister since his return.

Cross-examined.—She knew nothing of the Holkar. At first, she did not recollect the prisoner, he has altered so much; but she knew him very well when he lived at her sister's.

Conklin, called again.—Was present at the police when the prisoner was asked if he knew the woman called Diana. He answered yes—said he boarded at Mrs. Parson's, in James' st., with her.

Diana was called again, and stated that she boarded with the prisoner at Henry Parson's.

Oliver King, a mulatto man, and the principal witness, was next called. (Haines objected to the competency of the witness, on the ground that he had been in the State Prison. It appeared that he had been indicted for grand larceny, and convicted on the 7th of October, 1819, when he was sentenced to the State Prison for three years, and had served

his time out. The counsel for the prosecution replied, and produced a pardon from the governor, dated the 9th of April 1824. (See the judge's charge.) The objection was overruled by the court, and the examination proceeded.) Witness shipped on board the brig Holkar, in 1818, commanded by Samuel Brown. He shipped with Alexander Cheevers (or Shivers,) Charles Moutiza, Patrick Butler, (his right name was Harry Cook, called Cook or Doctor,) James Irving, John Robinson, (the prisoner) John Williams, (white man) and himself and mate. They were all coloured people except John Williams. Sailed on the morning of Sunday for Curacao, where they arrived and discharged, and took in a return cargo, and started for New York. At Curacao, Shivers had a dispute with the Captain. Captain Humphries, a passenger, took charge of the vessel; the captain and mate being sick, the men refused to work under him, when they were put in prison, except Robinson, Jones, and the cook, but Robinson was afterwards taken up for stealing part of a barrel of beef from the vessel, and remained in prison till the brig sailed. The night before, Alexander Cheevers, and Charles and James ran away but were taken up and carried on board, the morning she sailed. John Williams was left at Curacao, where he went in a Dutch man of war. Capt. Humphries came passenger in the brig, but used to do Captain's duty sometimes. When they had been out seven or eight days, the captain sent them up to bend another topsail about dusk; John, James, Charles, Alexander, and witness. They had some dispute aloft, and being reproved, they made some answer which induced the captain to go down and load his pistols. James and Charles pretended to be sick, and went below and staid in their berths. The captain made tea and coffee, and sent to them from the cabin. Charles was sick at this time. Charles and James and witness were in the captain's watch. The prisoner and Alexander Shivers were in the mate's watch. The witness was in his berth and nearly asleep, when Alexander came down and asked Charles whether he was ready, Charles said "yes." Witness asked what they were going to do? Charles answered none of your business. Robinson said he was going to call the mate forward and tell him there was something wrong there. Charles then told witness that they were going to kill the captain, the mate and the passenger. Robinson (the prisoner) went and called the mate forward. He came forward, and Charles and James jumped out of the fore-castle; Charles and James with a crowbar, and James with a hand-spike. Witness then heard somebody strike, and heard the

NEW YORK
March, 1824.

—
The People
v.
Tom Jones.

NEW YORK mate cry out "Murder!" and stamp on the deck; witness was March, 1824. below; when witness got upon deck, the mate was fallen. Witness cried out, "For God's sake, what are you doing!" Charles then answered, "You son of a bitch, if you say a word, I will knock your brains out." Alexander took his (the mate's) watch out of his pocket, and Charles, Alexander and James hove him overboard. They then went aft, and witness followed them. The prisoner said he would call captain Humphries up, for he used to do captain's duty. He went down, but captain H. would not get up. He then went down and told captain Brown the mate wanted him forward. Captain B. got up, and went forward as far as the windlass, when he started back, and all at once began to walk aft. Charles ran out from behind the camboose, and struck at him with a crowbar, which the captain caught in his hand, exclaiming, "Charles is that you?" Charles said "Yes." Alexander Cheevers now ran around the long boat and struck him twice on the head with a hatchet. James then took the handspike and struck him over the face: the prisoner then came with a harpoon, struck the captain in the left side. His head was lying towards the starboard. The Captain put his hand upon his breast, and then they picked him up and threw him overboard, and told witness to take the helm. At the time the mate was killed, the prisoner had the helm; and while they were killing the captain, the witness had the helm, but part of the time left it to see the fray. This done, Charles said, let us go down now and kill that damned privateer son of a bitch Captain Humphries; upon which all went down into the cabin, and told witness to keep the helm. Witness heard Capt. Humphries crying murder for some time; and then all four came up from the cabin, bringing Captain Humphries with them, and laid him down; and then hove him overboard. The cook came up after they had thrown Captain Humphries overboard. They told him to go down and clear up the blood in the cabin; he went and got a bucket of water and did it. They said Captain Humphries was getting the captain's pistols out, when they struck at him, and broke one of them in his hand. Alexander Shivers took charge of the brig. They then ran near Porto Rico, to the Mona Passage, and from thence to St. Domingo. Prisoner then bored holes in the brig to scuttle her, and they intended to go ashore in the boat. About two o'clock in the afternoon, a vessel was near them, and they were frightened, and took out the boat, and put aboard some provisions and clothing, and they all got in, except the witness, who at

The People
v.
Tom Jones.

first refused to go, until Charles took a pistol and threatened to shoot him if he did not. They went ashore about Jacquemel. After the murder, they found on board a box of gold, buckles, &c. : They also found 115 dollars, and a masonic apron, which was thrown overboard.

NW YORK,
March, 1824.

The People

v.
Tom Jones.

Cross-examined.—Witness was born in Orange county; his mother belonged to Benj. Sears; lived with his father at Staten Island until he was ten years old. This was his second voyage in the same vessel; never saw prisoner before. He went by the name of John Robinson; never heard him called Jones; came back in schooner, called the American, of Kennebeck. When they landed at St. Domingo, they went to Bennet, a town inhabited by blacks. Witness said nothing to any body about the murder, as he was afraid. They got one hundred and fifteen dollars, of which they gave witness 12 or 15. From Bennet they went to Jacquemel, where he walked. Alexander went up first, when they were all sent for by the commandant, but did not go then. Witness went on board the barque America, of Kennebeck, and went to the Havana; said nothing of it to the captain, as he was afraid of being tried in Havana. Saw the mate of the George Washington, (whom he had seen at Curacoa) and told him all about it; wanted witness to go to Africa with them for slaves. Came from Havana in the sloop Flag of Truce to New Orleans, from thence to New York in the brig Dolphin. Had irons put on him while on board the brig G. Washington; does not know the name of the captain and mate; he was brought in irons to New Orleans, where he was put in jail. Mr. Orr assisted him, and he got him out of prison, with whom he then lived for some time. This was some time in April. Witness came in the brig Dolphin, Captain Kent, as a hand, but he said nothing of this affair to any body on board; arrived about the first of May, 1819; does not know how many days passage. Went to the police in two or three days after he arrived in New York, and told all the particulars. About the latter part of August was taken up for stealing. He then lived with his mother in William st.; did not do much of any thing; worked at the steamboats, carrying wood. Did not steal at all after he came ashore; confessed that he stole, before the police. Did not break open the door of Dr. Drake's house, and did not go up stairs in the house at all for the things.

Oliver Stevens, Clerk of the Police, knows *Oliver King*; he has been brought up at that office two or three times.

King called again. Had but one pistol in the boat; was

BOSTON, at the time 18 or 19 years old. Captain Brown was a large March, 1824. stout man.

Mary Adams—Knows the prisoner; 5 years ago lived in Bancker-st. at Mary Sales'; does not know whether he sailed in the brig Holkar; he went to sea about that time; don't know what vessel; saw him in prison for the first time since his return; he knew witness immediately.

The People
v.
Tom Jones.

Cross-examined.—Never told witness that he was going to sail in the Holkar; never heard him called Robinson, but Tom Jones.

The counsel for the prosecution here rested the case; and the Court directed a recess for an hour, that the jury might obtain some refreshments. At a few minutes before 5 o'clock the Court re-assembled, and the defence was opened by Mr. Haines.

EVIDENCE FOR THE PRISONER.

John Edwards knows the prisoner. He sailed in the brig Commodore Porter, Captain Doane, in 1818, to bring timber from St. Mary's. Witness knew him in Baltimore, more than fifteen years ago—saw him when he came home in the Maria, since 1818, whence he shipped immediately in a vessel lying at Pine-street. He was always called Tom Jones; shipped him by that name about 18 months since. His character is very good, as given by Capt. Downes. Has heard lately that he was on board the Holkar. The first voyage was about three months. Witness went four voyages to St. Mary's. The prisoner went the 1st and 2d voyage, the third voyage he returned a little before Christmas; knows Oliver King; witness stood his bail twice, and his girl's; don't know his character as to truth and veracity; he has the character of a thief. Witness never heard any thing against Diana Valentine, nor against Peter Willis.

EVIDENCE FOR THE PEOPLE.

Oliver Stevens again.—Has seen King often; thinks he would speak the truth, and would believe him under oath.

John Edwards again. Saw King the next day after the prisoner was taken up; went up to see him; asked what Tom had been doing; he would not tell; saw him again in the evening, when he told witness; did not tell King that if he was in his (King's) place he would not have him taken up.

Azel Concklin called again. The character of the last witness does not stand very fair; from the knowledge he (witness) has, he should not be willing to place confidence in him, where he was prejudiced either way. Witness has known Oliver King four years, and would put twice the confidence in him that he would in the last witness.

N'W YORK,
March, 1824.

The People
v.
Tom Jones.

James Hopson, (Police Justice).—The examination of Oliver King, of the 3d of June, 1819, was read. Witness said King came voluntarily, and underwent this examination; never saw him before he made this deposition, nor since, till he came and gave information that prisoner was in town; he never had reference, nor had any other person, to this examination, as it was filed in the police office. (We have compared the examination with the testimony, and it agrees exactly.)

Jarvis Lockwood.—Knows Diana Valentine; she lived in his family; knew her in 1810 to 12; 14 or 15 years; her character is good for truth and veracity, has seen her six or seven times since she was married; keeps a very decent sailor boarding house.

Zebulon Homans, (a marshal) does not know much of John Edwards; he is an immortal man. Diana Valentine's character is good every way; has known her for four years; was a regular woman in going to church; never saw any thing improper in her house. She sustained a very good character among her white neighbors. Oliver King's general character is not very good.

Julia Willis, knows the prisoner at the bar; the 2d year after the peace lived at Henry Parsons; her husband shipped him; found him a pretty steady, clever man. Her husband shipped him the year after the peace. Witness knows King's family; he is not as clever as he might be; has been a bad boy from his childhood up; when he went to school he used to pick up things not his own.

The case was summed up by Messrs. Haines and Van Wyck, for the prisoner, and by Mr. Tillotson, for the United States.

CHARGE TO THE JURY.

THOMPSON, Justice. Gentlemen of the jury—The question for you to decide is one involving the life of the prisoner. It is for you to say whether he is guilty or not guilty. The material point in this case is, whe-

NEW YORK, **March, 1824.** **The People** **v.** **Tom Jones.** ther the prisoner at the bar is the person who shipped on board the *Holkar*, in 1818, as sworn to by David Valentine, Oliver King, Peter Willis and Mr. Bogart.

The offence as charged in the indictment, if committed at all, is an aggravated piratical murder. It took place upon the high seas, and is therefore within the jurisdiction of this court.

It satisfactorily appears by the evidence, that the *Holkar* cleared for Curacoa in October, 1818. There can be no doubt of this fact: indeed, it is not denied. It appears also that the vessel was commanded by Captain Brown; that her crew, with the exception of one person, was composed of coloured people. This appears by the testimony of Diana, King, Willis, Mr. Bogart and Mr. Conklin. It appears by the register of the ship and Notariallist of Mr. Bogart, (which agree with each other) that Alexander Cheevers, Charles Moptiza, Patrick Butler, (called Cook) James Irving, Charles Robinson, (the prisoner,) King, the witness, and the mate were the crew of the vessel. The vessel sailed for Curacoa, since which time nothing has been heard of her. The insurances upon the *Holkar*, and her cargo have long since been paid. There is no doubt therefore the vessel has been lost, whether in the manner related by King, or not, remains for you to determine.

Before his honour recapitulated King's testimony, he called the attention of the jury to the infamy of his character. It appears (said he) by the record of the General Sessions that King has been convicted of a larceny, and has been sentenced to the state prison—has served out his time, and has received a pardon from the Executive of the state, for the purpose of making him a witness against the prisoner—all since the commission of the al-

leged murder. His honour observed, he had no doubt of the efficacy of the pardon, and that he was now a competent witness; his credibility, however, was still a subject for the consideration of the jury. The law has made him a competent witness; but the jury were not compelled to believe him, and he should advise the jury to give no weight to his testimony where he was not corroborated by others. He averted to the examination of King, made on the 3d of June, 1819, immediately on his arrival in this country. The objection then to his credibility did not exist. That examination, and his testimony here to day, appear to agree in all essential particulars; and it appears by Justice Hopson, that it was not possible for him to have had access to that paper.

N^W YORK,
March, 1824.

The People
v.
Tom Jones.

His honour instructed the jury, that the testimony of King ought to have no weight in their minds, unless corroborated by others, or by the circumstances of the case—and proceeded to detail the principal facts of the loss of the vessel, and the murder of Captain Brown, the mate, and Captain Humphries, as related by King, (see his testimony.) He remarked upon the consistency of King's story—the minute history of the circumstances he had given—the difficulty, not to say impossibility of King's framing such a connected chain of facts.

It could not have escaped the jury (said his honour) that the case depended materially upon the circumstances. Before he enumerated them; he remarked upon the nature of circumstantial evidence. A number of cases have been cited and read, to show you the dangerous tendency of this kind of proof. It is possible an innocent person may have suffered, but such cases, (if any such there were) could be no objection to this kind of

N^W YORK evidence; if jurors were to disregard it, there would be
March, 1824. an end to the administration of law, and to government.
 ~~~~~  
**The People** It was (he observed) the duty of the jury to weigh all the  
**v.** evidence for and against the prisoner, and that fair and  
**Tom Jones.** legal inferences were to be made from facts and circum-  
 stances proved—they were often more satisfactory and  
 conclusive than the testimony of witnesses.\*

Then as to the identity of the prisoner. Notwithstand-  
 ing he shipped on board the Holkar by the name of  
 Charles Robinson, and was known only by the name of  
 Tom Jones, yet it appeared by the testimony of a num-  
 ber of witnesses he was the same person. Diana Val-  
 entine swears positively, that she was well acquainted  
 with the prisoner; that she had boarded in the same  
 house with him before the Holkar sailed. Peter Willis  
 has known the prisoner for ten years, and testifies he  
 shipped on board the Holkar; he knew him in this city

\* See the note preceding How's case, ante, page 410. The re-  
 marks of Justice Park, in his charge to the jury in the case of  
 the King v. John Thurtell, for the murder of Mr. Weare, Hert-  
 ford assises, January 1824, are too beautiful and appropriate  
 to be omitted. He says, remarking upon circumstantial evi-  
 dence:

"The eye of Omniscience can alone see the truth in all cases;  
 circumstantial evidence is there out of the question; but cloth-  
 ed as we are with the infirmities of human nature, how are we  
 to get at the truth without a concatenation of circumstances?  
 Though in human judicature, imperfect as it must necessarily be,  
 it sometimes happens, perhaps in the course of one hundred  
 years, that in a few solitary instances, owing to the minute and  
 curious circumstances which sometimes envelope human trans-  
 actions, error has been committed from a reliance on circum-  
 stantial evidence; yet this species of evidence, in the opinion of  
 all those who are most conversant with the administration of  
 justice, and most skilled in judicial proceedings, is much more  
 satisfactory than the testimony of a single individual, who swears  
 he has seen a fact committed."

by the name of Tom Jones. Julia Freeman, Mary Adams, (see the testimony) swear they knew the prisoner; he was called Jones. There was no doubt, continued his honour, that the prisoner at the bar was the same person who shipped on board the Holkar by the name of Charles Robinson, and that he is the same person known by the witnesses by the name of Tom Jones.

N<sup>W</sup> YORK,  
March, 1824.

The People  
v.  
Tom Jones.

His honour then proceeded to recapitulate the circumstances of the case—the sailing of the Holkar—no information having since been received of her—King's examination—his connected story—the recognition and arrest of the prisoner—King's testimony, &c. and concluded that the case depended almost entirely upon his testimony—as he was proved to be a convicted felon, although restored to competency by the clemency of the executive, it was the duty of the jury to sift his testimony—that where he was not corroborated on the main points, by testimony of witnesses, or by the circumstances, they ought to pay no regard to it, and that if after a full and impartial view of the case, they were satisfied the evidence did not support the indictment, or if they had a fair and reasonable doubt, it was their duty to acquit; but if they were satisfied that King was corroborated by the testimony of other witnesses and by the circumstances of the case, and they had no reasonable doubt of the prisoner's guilt, it was their duty to say so.

He was found guilty, and sentenced to be executed on the 11th June, 1824.

## GENERAL COURT VIRGINIA.

JUNE, 1811.

*Commonwealth* }  
v. } LIBEL.  
*John Morris, jun.* }

Truth is no justification (in Virginia) of a libel, and cannot be given in evidence on an indictment for information: but there are two exceptions to this rule of law. The people have a right to be informed of their public agents; therefore, against officers and candidates for public office, truth is a justification, and may be given in evidence.

In no case is it necessary or proper that the defendant against whom there is an indictment or information for a libel should plead the truth.

In all cases the truth may be given in evidence in for the promotion of the convenience and welfare of a majority of the people of this county; that the place he proposes the fine. See the excellent

An information was filed against the defendant in the superior court of law, for Cabell county. It set forth that the defendant being a person of an envious and evil and wicked mind; and maliciously, and unlawfully contriving and intending as much as in him lay, to injure, oppress, and vilify the good name, fame, credit, and reputation of a certain Thomas Ward, a good citizen of this commonwealth, and sheriff of the county of Cabell, and to bring him into contempt, infamy and disgrace, and to represent him as a corrupt officer, &c., a certain scandalous and libellous writing maliciously and scandalously did write and publish, and then, &c. did cause to be written and published, in the form of a petition, addressed to the honourable the speaker, and members of the general assembly of this commonwealth, in which said libel are contained divers scandalous, scurrilous, and malicious matters according to the tenor following:

"But the said Major Ward being desirous of having it (meaning the seat of justice of Cabell county) on his own plantation, where it was first held, has, and now is circulating a petition in this county, addressed to your honourable body for that purpose. Your petitioners beg leave to state that the said Major Ward is actuated only by selfish and interested motives, and is by no means governed by a desire for the promotion of the convenience and welfare of a majority of the people of this county; that the place he proposes is on his own land; that it is not only rendered almost inac-

cessible, by reason of the hills and mountains surrounding it, but is not near the centre of population or territory, so that it is among the most inconvenient places that could possibly be thought of, and that the said Major Ward uses base and dishonourable means to forward his views; for that he being high sheriff of this county, and of course has the collection of the public revenue and taxes, he persuades ignorant and illiterate men to sign his petition, frequently stating that for so doing, he will indulge them a time, and not be over strenuous in his collections; that the people of this county are generally poor; and as there is very little money in circulation among them, an indulgence of this kind is to them a great favour; that the said Major Ward does not present his petition at any public collection of the people, when the merits of it may be inquired into and discussed, but procures signers to it, as he rides through the country, in his office of sheriff, in secret and hidden places, to the great scandal and damage of the said Thomas Ward, to the evil example of all others in like case offending, and against the peace and dignity of the commonwealth."

VIRGINIA,  
June, 1824.

Com'wealth,  
v.  
John Morris.

opinion of  
Judge Tach-  
er on the ad-  
missibility of  
truth in evi-  
dence, &c.,  
ante, p. 437.

The defendant pleaded not guilty; on which issue was joined, and also tendered two other pleas. They were as follows: And for farther plea, the said defendant says, that it was lawful for him to write and publish the paper writing, charged in the information to have been written and published by him, because he saith, that all the charges therein set forth against the said Thomas Ward, are true, and all the acts therein charged to have been done, and committed by the said Thomas Ward, were in fact and in truth done and committed by the said Thomas Ward, and this the defendant is ready to verify. The other plea was also a plea of justification, and differed only from the first, that it recited, "that the said Thomas Ward, at the time of the writing being written and published, and before that time, was a public officer, to wit, high sheriff of the county of Cabell," and then set forth that the charges were true, as in the first special plea.

VIRGINIA,  
June, 1824.

Com'wealth

v.  
John Morris.

The attorney for the commonwealth objected to the reception of these pleas, "because the matters therein alleged can neither be pleaded, nor given in evidence on the general issue."

Whereupon the court ordered "the question arising on the said objection to be adjourned to the General Court, and requested the decision of the following points, viz.:"

"1st. Whether the defendant to an indictment or information for a libel can, in all cases, plead the truth of the libel in justification?"

"2d. If not, whether he can give the truth of such libel in evidence, on the plea of not guilty.

"3d. Whether in this particular case the defendant can in either way, and which, give evidence of the truth of the matters stated in the writing alleged to be libellous."

At a general court, June 12, 1811, present, Judges Nelson, White, Holmes, Brockenbrough, Johnson, Carr and Smith, the following opinion was given: "It is the unanimous opinion of the Court, that by the common law, truth is no justification of a libel, and cannot as such be given in evidence on an indictment or information for the offence. In this commonwealth, the second article of the bill of rights having declared, "that all power is vested in, and consequently derived from the people, that magistrates are their trustees and servants, and at all times amenable to them. It follows as a necessary consequence that the people have a right to be informed of the conduct and character of their public agents. In the case of an indictment or information for a libel against public officers, or candidates for public office, truth is a

justification, and may be given in evidence as such under the general issue, and this forms an exception to the general rule, and established by the common law, but even in such case any libellous matter which does not tend to show that the person libelled is unfit for the office, cannot be justified because it is true. In case of individuals who are neither officers nor candidates for office, truth is no justification of a libel, but in all such cases it may be given in evidence in mitigation of the fine. In the case now before the court, the truth may be given in evidence in justification, it being lawful for a petitioner to state to the legislature the facts set forth in the petition, charged in this case as a libel. In no case is it necessary or proper, that the defendant, against whom there is an indictment or information for a libel should plead the truth.

VIRGINIA,  
June, 1824.

Com'wealth  
v.  
John Morris

## OYER AND TERMINER.

NEW YORK, JANUARY, 1807.

*The People* }  
v. } MURDER.  
*Eleanor Rankin.* }

Present—Hon. *Wm. W. Van Ness.*

*Richard Riker*, Esq. District Attorney, for the people.

*Doctor Graham* and *Thomas Addis Emmet*, Esqrs.,  
for the prisoner.

On Saturday came on the trial of Eleanor Rankin, a negro girl, for poisoning her mistress, Margaret Smith, the wife of Wm. H. Smith, of this city.

It appeared by the testimony of Mr. Smith and his daughter, that some ratsbane had been procured by Mrs. Smith, about the 20th of August last, for the purpose of

A confession induced by saying "if you do not tell all you know about the business you will be put in the dark room and hanged," cannot be given in evidence.

REPORTS OF CRIMINAL LAW CASES.

NEW YORK,  
Jan. 1897.

The People  
v.  
Rankin.

killing rats, and had been mixed with some meal. The prisoner was supposed afterwards to have purchased some more. It was placed in the garret where the prisoner slept. Three or four days afterwards the coffee was so disagreeable that the family could not drink it, and it was thrown away. On the morning of the 27th they breakfasted between 8 and 9, and at 11 o'clock Mr. Smith was taken very sick. He came home at 12, and found his wife and daughter unwell.

They were all exceedingly sick at their stomachs, and sent for Doctor Onderdonk. They were confined 10 or 12 days, when all of them were recovering. On the 14th of September, they were all taken sick again in the same manner, and Mrs. Smith died in about four days. There was no other servant in the family. All the family, except the prisoner, were sick both times, and the same symptoms took place in both cases.

Dr. Onderdonk and Dr. Post were examined. They both described the effects of arsenic when taken in the stomach, and they expressed an unequivocal opinion that Mrs. Smith was killed by poisoning with arsenic.

It appeared also that the prisoner was a very subtle, perverse girl, and that on being taken to Bridewell the day before her trial she acknowledged her guilt.

The district attorney then offered the confession of the prisoner, as taken regularly by the public clerk. Mr. O'Brien proved that it was taken with great care and accuracy, and was perfectly voluntary. It contained, as was stated in court, a full and circumstantial account of the means taken by the prisoner to poison the family, and which agreed, in every essential point, with the facts disclosed by Mr. and Miss Smith.

Here the counsel for the prisoner interposed, and produced Ab. Curtis, one of the marshals, to prove that

the written confession, taken by the police clerk, had been made in consequence of threats used by himself in bringing her to the office. Curtis swore that he had said "if you do not tell all you know about the business, you will be put in the dark room and hanged."

N<sup>W</sup> YORK,  
Jan. 1897.

The People  
v.  
Rankin.

*By the Court.* The confession of a prisoner must be free and voluntary, or it cannot be given in evidence upon his trial. In the case now before the court, it appears the officer who made the arrest, and then had the prisoner in his custody, said to her "if you do not tell all you know about the business, you will be put in the dark room and hanged." This was such a threat as might, and probably did induce a fear and apprehension of her life, and is such a threat as, in the opinion of the Court, destroys the legality of the subsequent examination. A confession upon an official examination, or to other persons, if obtained under the impression of hope or fear, cannot be admitted in evidence, however slight those impressions may be.

The prisoner was acquitted.

NOTE.—A confession, induced by saying "unless you give us a more satisfactory account, I will take you before a magistrate," will not be received. It amounts to a threat. *Rex v. Thompson*, Leach's C. L. 325. So a confession made in consequence of these words: "I am in great distress about my irons, tell me where they are, and I will be favourable to you," will not be admitted, Leach, 328.

It is not necessary to invalidate the confession, that the threat or promise should be made by the magistrate who takes the examination, they may be made by the officer who makes the arrest, or by any private person who has the control for the time being of the prisoner. *McNally's Ev.* p. 29.

(It ought perhaps to be remarked in this place, that the greatest care and caution should be observed by officers and others who arrest and have the care of persons charged with felony, that they do not hold out any pro-

NEW YORK,  
Jan. 1807.

The People  
v.  
Rankin.

mises, or offer any threats, to induce them to make a confession of the crime of which they are charged. The examination, as has been observed before, must be free and voluntary: any improper threat, promise or representation by the magistrate, or other person who has the control of the prisoner, will vitiate the examination, however slight it may be, because it is impossible to say whether a confession, induced by these means, is not made rather from a motive of fear or interest, than from a sense of guilt. (See vol. 1. tit. Confession.)

Mr. Capal Loft, the learned editor and amplifier of the last edition of "Gilbert's Law of Evidence," in his reading upon the authorities cited from Hale, gives a caution worthy the attention of the minor magistrates. It appears, therefore, says Mr. Loft, that if any of the requisite circumstances are wanting in this species of proof (confession) it will be rejected; and on the last circuit Sir George Nares even went farther; he, though sinking under his illness, exerted his accustomed vigilance and benevolence in the case where the admissibility of a confession in writing was rendered doubtful, by circumstances, at the time of making it. If practicable, it may seem always best, where the confession of the prisoner is taken, that it may be in the presence of one or more indifferent persons unconnected with the *prosecutor*, the *magistrate* or *prisoner*, at least the two former, and that it may be provable to have been deliberately and freely made. *Gillb. Ev. by Loft, p. 216.*)

GENERAL COURT OF VIRGINIA.

NOVEMBER, 1796.

*The Commonwealth,* }  
v. } MURDER.  
*Robert Mitchell.* }

The prisoner was indicted at the Winchester District Court, April, 1796, for the murder of Frederick Bechtoll. The jury found a special verdict as follows :

" We the jury find, that on the evening of the 21st of January, 1796, the said Robert Mitchell, the prisoner at the bar, came to his own house in the county of Berkley, and within the jurisdiction of this court, in a state of intoxication; that he the said Robert Mitchell, then and there eat his supper, and then and there went to bed about six o'clock at night, and apparently went to sleep; that about a quarter of an hour after six o'clock, he then and there awoke, and desired his the said Robert Mitchell's wife to come to bed, which she not complying with, a quarrel immediately ensued, and he the said Robert Mitchell, then and there pulled his said wife by the hair of her head. That the deceased, the said Frederick Bechtoll, then and there interposed to part them; that a scuffle ensued between the said Robert Mitchell and the said Frederick Bechtoll, the said Frederick Bechtoll then and there residing and boarding with the said Robert Mitchell, whereupon the said Robert Mitchell then and there took down his gun; that the said Frederick Bechtoll, then and there took the said gun away from the said Robert Mitchell, and he the said Frederick Bechtoll, then and there put the said gun up again. That a second quarrel and scuffle then again immediately ensued between the said Robert Mitchell and his said wife, that the said Frederick Bechtoll again interposed to part them, and a second scuffle again then and there immediately ensued between the said Robert Mitchell and the said Frederick Bechtoll; that in the scuffle the said Robert Mitchell fell over a spinning wheel, which hurt his face so that it bled; that the said Frederick Bechtoll then and there immediately ran out of the house. That the moment the

A. came home intoxicated, eat his supper and went to bed, and apparently fell asleep; in a quarter of an hour got up and in a quarrel with his wife, caught her by the hair, B., who was a boarder in the house interposed and a scuffle ensued between A. and B.; A. took down his gun, and B. took it away from him and put it up again. A second quarrel immediately ensued between A. and his wife, in which B. again interposed to part them: in a scuffle between A. and B. A. fell over a spinning wheel, and

VIRGINIA,  
Nov. 1796.

Com'wealth  
v.  
Mitchel.

hurt his face,  
so that it bled,  
and B. ran out  
of the house;  
A. again seiz-  
ed the gun and  
pursued B. to  
the door (who  
had retreated  
fifteen yards  
from the  
house and  
was still re-  
treating) and  
shot him dead  
on the spot—  
held not mur-  
der.

said Robert Mitchell recovered from his fall, he then and there ran and got his said gun again, the same being then and before the said Robert Mitchell came home in the evening, ready loaded by the said Frederick Beckettoll, to whom it had been lent some days before, but whether the said Robert Mitchell then and there knew the said gun to be loaded, the jurors are wholly ignorant, and the said Robert Mitchell then and there instantly pursued the said Frederick Beckettoll to the door of the house, and then and there standing at the door of the said house, he the said Robert Mitchell then and there instantly discharged the said gun towards the said Frederick Beckettoll, the moon then being shining so that the said Frederick Beckettoll could be seen and the ground covered with snow, he the said Frederick Beckettoll then and there being at the distance of between twelve and fifteen yards from the said Robert Mitchell, and going away from the house, and with a leaden bullet, as charged in the said indictment, from the said gun shot, did intentionally shoot and wound the said Frederick Beckettoll then and there in the back, as in the said indictment is charged, of which wound the said Frederick Beckettoll fell and expired; he the said Frederick Beckettoll was carried into the house of the said Robert Mitchell. That the said Robert Mitchell directed his son to take the gun and lay it where the said Frederick Beckettoll had fallen, in order that the people might be induced to believe that the said Frederick Beckettoll had shot himself. That from the time the said Robert Mitchell first got out, of his bed to beat his said wife as aforesaid, to the time of the shooting of the aforesaid Frederick Beckettoll, was near one quarter of an hour; that during that whole period the said Robert Mitchell and the said Frederick Beckettoll were quarrelling or scuffling. We find that the said Frederick Beckettoll was during the whole time then and there unarmed; that there had not been any former quarrel or grudge between the said Robert Mitchell and the said Frederick Beckettoll, the deceased, so far as the jurors are informed. And if upon the whole matter the court shall be of opinion that the said Robert Mitchell is guilty of murder, then we, the jury, find the said Robert Mitchell guilty of murder, otherwise we the jury find the said Robert Mitchell guilty of manslaughter, only."

The question arising on this special verdict was adjourned, and at a General Court, November 16, 1796, present Judges Prentis, Tucker, Tyler, Jones, White, and Nelson, the following judgment was entered.

"The question of law arising on the special verdict in the transcript of the record of the said case mentioned being argued, it is the opinion of the court that the said Mitchell is not guilty of murder."

VIRGINIA,  
Nov. 1796.

Com'wealth  
v.  
Mitchell,

## GENERAL COURT OF VIRGINIA.

NOVEMBER, 1813.

*The People*  
vs.  
*John Edloe Thompson.* } MALICIOUS STABBING.

At the Superior Court of Law held for Surry county, on the 29th September, 1812, an indictment was found against the prisoner, in which he was charged with the malicious stabbing of Joseph Warren. He was arraigned, and pleaded, and put on his trial, and the jury, after hearing the evidence and the arguments, retired to consult on their verdict. On the 6th of October, during the same term, the jury not having agreed on their verdict, the prisoner was, on his motion, admitted to give bail for his appearance on the first day of next court.

Jury—dis-  
charge of in  
criminal cas-  
es. See ante,  
Vol. 1, p. 474.

At the April Term the prisoner appeared in court in discharge of his recognizance, and moved the court that he should be discharged from the prosecution, alleging that he had been arraigned at the last Superior Court of Law, held for the county of Surry, for the same offence, and that a jury had been empannelled to pass between the said prisoner and the Commonwealth, and had been charged with his case; that the jury had retired to con-

VIRGINIA,  
Nov. 1812.

The People  
v.  
Thompson.

Other cases  
where the jury  
may be dis-  
charged.

ed a discharge on the constitutional provision that no man shall be twice put in jeopardy for the same cause.

The court decided they had a sound discretion to discharge a jury, it being essential for the due administration of justice.

If a *juror* be taken ill during a trial for a felony, the jury may be discharged by the court, and the prisoner be tried by another jury. Leach, 706.

If a *prisoner* be taken suddenly ill during the trial, the jury may be discharged from the trial of that indictment, and the prisoner on his recovery may be tried on the same indictment, by another jury. Leach, 618.

The court have a discretion to discharge a jury in a criminal case, capital or otherwise, whenever it is necessary to the administration of justice. 2 Gallison, 464. 2 John's Cases, 275.

In Borden's case, 9 Mass. Rep. 494. a juror was withdrawn, and the jury dismissed, after they had been out a long time; and on returning into court, said it was not possible they could ever agree. Borden was afterwards tried and convicted, and the conviction was held good.

The court may, in their discretion, discharge a jury in a criminal case, who are unable to agree on a verdict, and against the consent of the prisoner, who may be brought to trial a second time for the same offence. 2 Johns. Cas. 301.

## CIRCUIT COURT, U. S.

BALTIMORE, MAY TERM, 1815.

*Present*—Hon. Duvall and Bland.

|                          |   |          |
|--------------------------|---|----------|
| <i>United States</i>     | } | TREASON. |
| v.                       |   |          |
| <i>John Hodges, Esq.</i> |   |          |

*Elias Glenn*, Esq. Counsel for the United States.*U. S. Heath, J. E. Hall, and Wm. Pinckney*, Esqrs.  
Counsel for the Prisoner.

The facts of the case were as follows: while the British army was on the retreat from the city of Washington, last summer, as they passed through George county, some of the people of the town of Upper Marlborough, took four stragglers, who were following the army. They were sent into the interior of the country together with a deserter. As soon as they were missed, they were demanded by the British commander, under a threat that the town should be destroyed if they were not obeyed. Communications passed between the two parties, the result of which was that the men were restored to the enemy.

It appeared by the testimony of John Randall and others, that on Saturday after the engagement at Bladensburg, General Bowie brought three prisoners to Queen Anne, and asked Randall to stand guard over them, which he did. During the night Mr. William Lansdale brought another. Early in the morning the prisoner and his brother appeared and demanded them; they said that the British had threatened to destroy the

It is the duty of the Court to declare what the law is to the jury when requested, either by the prosecutor or the prisoner, in any stage of the case; but the jury are not bound by their direction.

Delivering up prisoners and deserters to the enemy, is adhering to them, giving them aid and comfort, and is treason against the U. States. Nothing will excuse the act but a wellgrounded fear of life. When the act amounts to treason, it involves the intention.

BALTI-  
MORE,  
May, 1815.

U. States  
v.  
Hodges.

town, unless this requisition was obeyed before 12 o'clock, &c. and that they would hold their wives and children as hostages.

The witness sent for General Bowie, who at first refused to suffer them to go; upon an explanation of the threat, he said it was hard, but he supposed they must be returned. They were delivered up to the prisoner, who surrendered them to the British.

*Mr. Pinckney* on behalf of the prisoner, read an address from the grand jury to the President of the United States, in which the jurors expressed their respect for the motives of the prisoner, and prayed a nolle prosequi.

*Mr. Glenn* prayed the court to direct the jury that the mere act of delivering up prisoners or deserters, is an overt act of high treason.

*Pinckney.* There is no law in this prayer, for it excludes that which is the essence of the offence, intention; and if it was otherwise, the court has no right to instruct the jury, as if this were a civil case. No instance has occurred in modern times of an attempt to bind the jury in such a case by the opinion of the court. What remedy is there for the party if you err? We may appeal to a higher tribunal, it is true, but what is the consequence? The man is hanged, and your judgment is reversed.

In England, did their courts interfere in this mode in the celebrated cases of Hardy, and Horne Tooke and others? No, it would not have been endured. The best security for the rights of individuals is to be found in the trial by jury. But the excellence of this institution consists in its exclusive power. The jury are here judges of law and fact, and are responsible only to God, to the prisoner, and to their own consciences. After the case is

*closed*, you may indeed *advise* the jury, if they ask it, or if you think proper to do so; without being asked by them. But to interrupt the progress of the trial in the way proposed would be monstrous. Suppose the court to give the direction, I shall not submit to it as the prisoner's counsel. I will, on the contrary, tell the jury that it is not law. It is my right to do so, and in a case of blood, I dare not forego the exercise of it. I trust I shall not be placed in a predicament which will thus set my duty to a man whose life is in my charge, against my respect for this tribunal. I pray your honours to suffer this cause to go on in the customary and legal manner. . . .

BALTI-  
MORE,  
May, 1818.  
—  
U. States  
v.  
Hodges.

*Glenn* observed, that it was the practice every day in the criminal court, and appealed to one of the counsel for the prisoner, whose long career as a public prosecutor must have furnished innumerable instances.

*Jennings*, for the prisoner, said, that being thus called upon, he was sorry he could not aid the District Attorney by any such precedent. He never knew an instance; while he was prosecutor for the state, of praying a direction on behalf of the state, though it was frequently done by the traverser.

The court said, they were bound to declare the law whenever they were called upon, in civil or criminal cases; in the latter, however, it was their duty to inform the jury that they were not obliged to take their direction as the law. In the case at bar, they declined giving any opinion at present, being desirous to hear counsel.

*Glenn* then said he would not now address the jury.

*Pinckney* regretted that his learned friend across the table had not seen fit to come forward in support of his

BALTI-  
MORE,  
May, 1815.

U. States  
v.  
Hodges.

case, as he wished to have delivered a brief homily on the law of treason; not indeed for the benefit of his client, but for the instruction of others, who appeared to stand in need of it.

/ *Mr. Glenn*, in support of his prayer, read to the court the following authorities: 1. East, C. L. p. 70. If the joining with rebels be from fear of present death, and while the party is under actual force, such fear and compulsion will excuse him.

But an apprehension ever so well grounded, of having property wasted or destroyed, or suffering any other mischief, not endangering the person of the party, will be no excuse for joining or continuing with rebels. Ibid. p. 71.

2 Dall. 346. Vigol's case. This was an indictment for high treason, in levying war against the United States. Patterson, who presided in that case, said there were two points for consideration—the facts and the intention. He stated the evidence and the design, and concluded that the combination of these facts with this design, consummated the crime of high treason in the contemplation of the constitution and law of the United States. It may not, said the judge, be useless, on this occasion, to observe, that the fear which the law recognizes as an excuse for the perpetration of an offence, must proceed from an immediate and actual danger, threatening the life of the party. The apprehension of any loss of property, by waste or fire, or even an apprehension of a slight or remote injury to the person, furnish no excuse.

The counsel then read Cranbourn's case from Salk. p 633. He then admitted that he must prove a certain portion of the intention, and that in the present case there was but two inquiries to be made.

1st. Did he deliver up the prisoners?

2d. Did he intend to do so?

Both these questions must be answered affirmatively; and therefore the treason was proved, and he had no more to say upon the subject.

*Pinckney.* Nothing but an utter confusion of ideas could have introduced a doubt upon the subject. The gentleman's prayer excluded all idea of criminal intention; or it relied upon the influence of criminal motive, as a necessary corollary from the naked facts charged, as the overt acts in the indictment.

It might be affirmed as an universal proposition, that criminal intention is the essence of every species of crime. All indictments commence with an assertion of corrupt motives; and in indictments for treason, the overt acts laid are to show the manner in which the wicked intention is carried into execution. In the speeches Lord Erskine, to whom the world is so largely indebted for a correct knowledge of the principles of civil liberty and the law of treason, you will find him perpetually contending, and contending with effect, that although the crown had proved the facts charged, it had not shown the evil design, the corrupt purpose, without which the facts are nothing.

The Counsel then referred to, and read part of Mr. Erskine's remarks in the case of Lord George Gordon. In that case it was proved that the prisoner incited the acts which produced the consequences complained of, yet he was acquitted, because he was not the enemy of the king, nor the friend of any man who was his enemy.

Take the case of a man who, in time of war, is charged

BALTI-  
MORE,  
May, 1815.

U. States  
v.  
Hodges.

BALTI-  
MORE,  
May, 1815.

U. States  
v.  
Hodges.

with the defence of an important fortress or castle, which he surrenders to an incompetent force. What more effectual means could he have adopted to aid the enemy than the delivery of this fortress? The books will tell you, that if he was bribed to this desertion of his duty—if he did it with a view to benefit the enemy, he is guilty of treason. But if pusillanimity was the cause, or if it arose from a false calculation of his own means, or the force of the enemy, he is not a traitor. You may banish him with ignominy from the ranks which he has disgraced, or try him by martial law as a coward or a fool; but he has committed no treason.

Suppose a powerful force to invade the country, to which resistance is hopeless; they levy contributions; they do not proclaim that they will hang me if I neglect to comply with this order; but they threaten plunder and desolation. I know they have the power to execute that threat—and I comply accordingly. Now the paying of money, or the furnishing of provisions, is an assistance; it is “giving aid and comfort” much more effectually than the delivery of a few prisoners or a deserter. Yet no man will call this treason; because there is no evidence of hostility to the interests of the country. The authorities say it is not treason. In *Stone's* case (1 East's C. L. 79.) the indictment charged as an overt act of adherence to the enemy, that the prisoner conspired, with others to collect intelligence within England and Ireland, of the disposition of the king's subjects, in case of an invasion of either country, and to communicate such intelligence to the enemy. The tendency of parts of the correspondence, which was given in evidence, was to advise the enemy against an invasion of England, by representing the improbability of its being attended with any success, from the general disposition of the people.

Now it was scarcely possible that such a correspondence could have been opened and maintained with other than cor-

rupt motives. Yet the counsel were allowed to argue that the letters were transmitted with a good intent, in order to avert the danger of so great a calamity as an invasion. And the Court said, the jury were to judge from all the circumstances, whether the intelligence had been sent with that view.

BALTIMORE;  
May, 1815.

U. States  
v.  
Hodges.

My client is charged, as Stone was charged, with being an *adherent*; and like him is entitled to be sheltered by his motives from the imputation of treason: The District Attorney confounds the indictment which you are now trying with an indictment for levying war. I admit that it has been decided, that if a man becomes an integral part of the enemy's force, and acts with it, he necessarily levies war, and is guilty of treason, unless it appears that he did so *pro terrore mortis*. The law will suffer no other exculpation of such conduct; it will excuse it upon no other motive. But will the gentlemen refer us to some authority which declares, that if a man, without joining the enemy so as to levy war, does, upon virtuous or even pardonable inducements, (having no reference to the promotion of the enemy's views) that which happens, or is calculated, to be advantageous to the enemy, he is therefore a traitor? What is an *adherent*? Can he be any thing less than a willing partisan, a corrupt auxiliary of the enemy? Such, at least, is the natural and ordinary import of the word; and you cannot strain it beyond that import by the refinements of construction, to the prejudice of the accused, without reviving the ferocious and appalling doctrine of constructive treason, which once made England bleed at every pore, and stained the palace and the cottage with judicial murder. The protecting spirit of the constitution, and of the statute which acts upon it, as well as humanity and justice, would be outraged by such a course.

Unlike the conduct of Stone, the conduct of Hodges presents nothing ambiguous to the most zealous scrutiny. His

BALTI-  
MORE,  
May, 1815.

U. States  
v.  
Hodges.

honourable feelings and intentions are acknowledged by all : he was urged by the solicitation of those whom he respected : he was led by a generous sympathy for the situation of one who is deservedly dear to all who know him : he was actuated by an apprehension, by no means unreasonable, for the quiet and safety of the affrighted women and helpless children of the neighbourhood, and for the security of the persons and property of the whole district. The treason of adherence cannot be committed by one whose heart is warm with all the honourable feelings of the man and the patriot. "Overt acts undoubtedly do discover the man's intentions ; but I conceive they are not to be considered merely as evidence, but as the means made use of to effect the *purposes of the heart*." Foster, 203.

This is the master key which lets you into the whole secret of this title of the criminal law. Sir Walter Tyrrel, who, in shooting at a deer, killed the king, could not be convicted of treason. The killing was *per infortunium*. So, where a person *non compos* slays another designedly, still he is innocent, because there is no malignity in his heart. So in every homicide, it is felonious, justifiable or excusable, according to the purpose with which the act was perpetrated. It is *murder* where it is done through malice ; *manslaughter*, if without malice ; where it is done through misfortune, or in self defence, it is *excusable*, and it is *justifiable* when done in advancement of public justice, in obedience to the laws. If the heart be uncontaminated by corrupt intentions, the man is innocent, for it is motive that qualifies actions. As it will be with God, so it is with the man : the latent intention of the heart must be searched.

Look at the *locus in quo*—the scene where the plot of this treason is laid. A hostile force, but the day before, had traversed the country in all the pride of victory. The *jus belli* was lord of the ascendant. The army, if such a force

may deserve the name, which had been relied upon for the defence of the capitol, had been broken up and dissipated to every quarter of the compass. The country was menaced by an enemy, with whom, to adopt the language of Cæsar, it was easier to do than to say. If I were addressing the jury I might appeal to their love of country. I might remind them that they are administering law for posterity as well as for us. But I am addressing a tribunal where these considerations have their full weight, and I expect with confidence that the court will vindicate the doctrines which I have had the honor to advance.

[After considerable delay, occasioned by the examination of the authorities, the court proceeded to pronounce an opinion.]

DUVALL, C. J.—The Court would have been better satisfied if the whole case had been gone through in the usual way; but as the District Attorney has prayed an opinion on the law, the Court will give their opinion.

1st. Hodges is accused of adhering to the enemy, and the overt act laid consists in the delivery of certain prisoners, and I am of opinion that the overt act laid in the indictment and proved by the witnesses, is high treason against the United States.

2d. When the act itself amounts to treason, it involves the intention, and such was the character of this act. No threat of destruction of property will excuse or justify such an act; nothing but a threat of life, and that likely to be put into execution.

3d. The jury are not bound to conform to this opinion, because they have a right, in all criminal cases, to decide on the law and the facts.

*Houston J.* said he did not entirely agree with the chief justice in any, except the last remark.

*Pinckney* then rose again, and addressed the jury.

The opinion which the chief justice has just delivered is not, and I thank God for it, the law of the land. If you have the slightest doubt on the subject, I will undertake to remove it, to show you that the cases have been misconceived, and that the conclusions drawn from them are erroneous.

No man can feel for the learned judge who has just given

BALTI-  
MORE.

U. States  
v.  
Hodges.

BALTI-  
MORE.  
May, 1815.

U. States.  
v.  
Hodges.

you his instruction, a reverence and affection more sincere than I do. But reverence and affection for him shall not stand in the way of the great duty which I owe to a fellow citizen who relies on me to shield his innocence from the charge of guilt, and his life from an attainder for treason. I had hoped that, since his motives were admitted, on all hands, to be entitled to praise, since the grand jury had associated with their indictment a certificate of the purity of his views, and a solemn recommendation that the prosecution should be abandoned, he would at least have been left by the District Attorney, and the Court, to obtain from you, as he could, a deliverance from the danger that encompassed him. In that hope I have been disappointed. As if the salvation of the state depended upon the conviction of this unfortunate man, whose situation, one would think, an INQUISITOR might deplore—the District Attorney has gone out of his way to bring down VENGEANCE upon him; and one of the Court has told you that he is a TRAITOR, and that you ought to find him so.

In a case where justice might be expected to be softened into clemency, and even to connive at acquittal, where every generous sentiment must take part with the accused, and law might be thought to fear the reproach of tyranny, if it should succeed in crushing him; in such a case the established order of trial is deserted, a pernicious novelty is introduced, the court is called upon to mix itself in your deliberations, to mutilate the defence of the prisoner's counsel, to harden your consciences against the solicitations of an enlightened mercy, and to sacrifice the prisoner to gloomy and exterminating principles, which would render the noble and beneficent system of law, for which we are distinguished, a hideous spectacle of cruelty and oppression.—For the sake of the country to which I belong, as well as of my client, I will not only protest before you against these principles, but will examine and speak of them with freedom, restrained only by the decorum which this place requires.

[After several introductory observations, Mr. Pinckney proceeded thus:]

In my argument to the court, I showed that if it be done treacherously, it is treason; but that if the commander act from any motive not corrupt, no indictment can touch him. If the fort be as impregnable as Gibraltar, and be garrisoned with 50,000 men, and it is surrendered to a force of half that number, from motives of fear, the commander cannot be punished as a traitor. What can be more strong to show that upon an indictment for adherence, the law looks into the

heart, and adapts its penalties accordingly? Has that authority been answered?

In the case of Stone, which was parallel with the point, the Court said expressly, if the heart be pure, it matters not how incorrect the conduct. So the counsel argued; and Stone was acquitted. Has any answer been given to that authority? Has any been even attempted?

This indictment charges Hodges with having done certain things, *wickedly, maliciously, and traitorously*. Must not the United States prove what they allege? When the law allows even words to be given in evidence, as explanatory of intention, to exculpate, it admits that exculpation may be made out by proof of innocent motives:—that overt acts *alone* do not furnish a criterion—that concomitant facts, illustrative of the state of the heart, must not be neglected.

A military force levies contributions.—If you pay them, for the purpose of saving the country from farther mischief, although there be no fear or danger of death, the law says this is not treason. By the doctrine of the chief justice, however, it is treason, and consequently his doctrine is unsound.

On this occasion, the enemy were in complete power in the district where the transactions occurred, which are complained of in the indictment. They were unawed by the thing which we called an army, for it had fled in every direction. They were omnipotent. The law of war prevailed, and every other law was silent. The domestic code was suspended. They menaced pillage and conflagration; and after they had wantonly destroyed edifices which all civilized warfare had hitherto respected, was it to be believed that they would spare a petty village, which had renewed hostilities, before the seal of its capitulation was dry? There was menace—power to execute—probability—nay, certainty, that it would be executed.

How, then, can you find a wicked and traitorous motive in the breast of my client?

There is not only the absence of any wicked motive, but there is the visible presence of those which are laudable: an attachment to Dr. Beanes—anxiety for the defenceless people about him—a desire to preserve the country from the afflictions which hung over it. In conduct so characterized, so produced, we discover the operations of an excellent heart, upon a mind which virtuous inducements could betray into error; but what way we can distort it into treason, I have not yet been able distinctly to learn.

The *conduct* is in itself treasonable, says the chief justice, it necessarily imports the wicked intention charged by the

BALTI-  
MORE.

U. States  
v.  
Hodges.

BALTI-  
MORE,  
Dec. 1823.

U. States,  
v.  
Hodges.

indictment. The construction makes it treason, because it *aids and comforts the enemy*.

These are strong and comprehensive positions; but they have not been proved; and they cannot be proved until we relapse into the gulf of constructive treason, from which our ancestors in another country have long since escaped.

GRACIOUS GOD! In the nineteenth century, to talk of constructive treason! Is it possible that in this favoured land—this last asylum of liberty—blest with all that can render a nation happy at home and respected abroad—this should be law? No. I stand up as a man to rescue my country from this reproach. I say there is no colour for this slander upon our jurisprudence. Had I thought otherwise I should have asked for mercy—not for law. I would have sent my client to the feet of the president, not have brought him, with bold defiance, to confront his accusers, and demand your verdict. He could have had a *nolle prosequi*. I confirmed him in his resolution not to ask it, by telling him that he was safe without it. Under these circumstances I may claim some respect for my opinion. My opportunities for forming a judgment upon this subject, I am compelled to say, by the strange turn which this cause has taken, are superior to those of the chief justice. I say nothing of the knowledge which long study and extensive practice enabled me to bring to the consideration of the case. I rely upon this; my opinion has not been *hastily* formed—*since the commencement of the trial*. It is the result of a deliberate examination of all the authorities, of a thorough investigation of the law of treason in all its forms, made at leisure, and under a deep sense of a fearful responsibility of my client. It depends upon me whether he should submit himself to your justice, or use with the chief magistrate the intercession of the grand jury, which could not have failed to have been successful. You are charged with his life and honour, because I assured him that the law was a pledge for the security of both. I declared to him that I would stake my own life upon the safety of his; and I declare to you now that you have as much power to shed the blood of the advocate as to harm the client whom he defends.

If the mere naked fact of delivery constitute the crime of treason, why not hang the man who goes under a flag of truce to return or exchange prisoners? According to the doctrine of the Chief Justice, this man is equally guilty with him who stands at the bar, if you are forbidden to examine his mind, but are commanded by the law to look only to his acts. I ask you to consider this, in the spirit of Stone's case: that doctrine, I pledge myself, goes through every nerve and artery of the law.

If the doctrine of the Chief Justice be the law of the land, every man concerned in the deeds of blood, that were acted during our recent war, was a murderer.

Our gallant soldiers who had repulsed the hostile step whenever it trod upon our shores; our gallant tars who unfurled our flag, acquired for us a name and rank upon the ocean which will not soon be obliterated—these are all liable to be arraigned at this bar. These men have carried dismay and death into the ranks of the foe; blood calls for blood. You dare not inquire into the causes which produced the circumstances; which attended the motives; which prompted the deeds of carnage. The act, you are told by the Chief Justice, and such is the reasoning of the attorney general, involves the intent.

Gentlemen! this desolating doctrine would sweep us from the face of the earth. Even when we deserved to be crowned with laurels, we should be stretched on a gibbet. I tremble for my children, for my country, when I reflect upon the consequences of these detestable tenets which reduces indiscretion and wickedness to the same level. Which of you is there that in some unguarded moment may not, with honest motives, be imprudent? Which of you can hope to pass through life without the imputation of crime, if your motives may be separated from your conduct, and guilt may be fastened upon your actions, although the heart be innocent?

Gentlemen! so solemnly, so deeply, so religiously do I feel impressed with this principle, that I know not how to leave the case with you, although at the present moment it strikes my mind in so clear a light that I know not how to make it more clear.

If this damnable prosecution should prevail, it would be the duty of the district attorney instantly to arraign Gen. Bowie, one of the witnesses in this case, than whom a purer patriot never lived.—Nay, half Prince George's county would come within its baleful influence.

Yet such is the law the Chief Justice recommends to you.—His associate does not concur with him. In this conflict of opinion I should be entitled to your verdict; but I rest the case upon more exalted grounds. I call upon you as honourable men, as you are just, as you value your liberties, as you prize your constitution, to say—and to say it promptly, that my client is not guilty.

The jury, without hesitating a moment, rendered a verdict of *Not Guilty*.

VOL. II.

62

BALTIMORE,  
Dec. 1814.

U. States,  
v.  
John Hodges.

**BOSTON, DECEMBER, 1814.**

Present—Hon. *Joseph Story*.

*George Blake, Esq., District Attorney, Counsel for the  
United States.*

*Benjamin Whitman, and Alexander Townsend, Esqrs.*  
Counsel for the prisoner.

*U. S. of America, District of Massachusetts, ss.*

At a circuit court of the United States of America, for the first circuit, begun and held at Boston, within and for the said district of Massachusetts, on the 15th day of October, in the year of our Lord, one thousand eight hundred and fourteen.

The object of such a reservation is to prevent the place from becoming an asylum for fugitives from justice.

When the fact of killing is proved, the law presumes it to be founded in malice. All circumstances of justification, excuse or mitigation, are to be proved by the prisoner, lest they arise out of the evidence produced against him.

Where a crime in itself capital, is endeavoured to be committed, with force, it is lawful to repel that force by the death of the party making such attempt. The law will not suffer, with impunity, any crime to be prevented by death, unless the same, if committed, would also be punished by death. Homicide in resisting an arrest, substantially illegal, will, at most, amount only to manslaughter.

**Homicide excusable and justifiable.** (See page 497.)

A soldier who has enlisted in, and served out his time in the marine corps, but who is refused his discharge, nevertheless, while he remains in the barracks, is subject to the rules of the establishment, and cannot violate them, except as to any act or exertion, the direct object of which should be to depart from the place.

And if engaged in a brawl or quarrel with others, he may be restrained by force, and put under confinement by the officers; and if the officers advancing to him for the purpose of arrest, he fires off a gun, which he had previously in his hand, and which he had loaded, declaring he would kill any person that approached him, and kills a person, it is murder. Even had the gun went off by accident, it would have been manslaughter—the act being unlawful.

The jurors of the United States of America, within and for the said district of Massachusetts, upon their oaths, do present, that George Travers, late of Charlestown, in the county of Middlesex, in the said District of Massachusetts, labourer; not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the 27th day of November, in the year of our Lord one thousand eight hundred and fourteen, with force and arms at Charlestown aforesaid, in the county of Middlesex, in the District of Massachusetts aforesaid, and in a certain place, commonly called the navy yard; situated in Charlestown aforesaid, which said certain place then was, ever since hath been, and yet is a place under the sole and exclusive jurisdiction of the United States of America; in and upon James McKim, in the peace of God, and of the said United States, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said George Travers, a certain musket of the value of five dollars, then and there loaded and charged with gunpowder, and one leaden bullet; which musket he the said George Travers, in both his hands, then and there had and held to, against, and upon the said James McKim, then and there feloniously, wilfully, and of his malice aforethought, did shoot and discharge; and that the said George Travers, with the leaden bullet aforesaid, out of the musket then and there by force of the gunpowder, shot, and sent forth as aforesaid, the aforesaid James McKim, near the pit of the stomach of him the said James McKim; and there with the leaden bullet aforesaid, out of the musket aforesaid, by the said George Travers, so as aforesaid, shot, discharged, and sent forth feloniously, wilfully, and of his malice aforethought, did strike, pene-

BOSTON,  
Dec. 1814.

U. States  
v.  
Travers.

BOSTON,  
Dec. 1814.

U. States  
v.  
Travers.

trate and wound ; giving to the said James McKim, then and there with the leaden bullet aforesaid, so as aforesaid, shot, discharged and sent forth, out of the musket aforesaid, by the said George Travers, in and upon the said breast of him the said James McKim, near the pit of the stomach, of him the said James McKim, one mortal wound, of the depth of eight inches, and of the breadth of half an inch ; of which said mortal wound the aforesaid James McKim then and there instantly died : and so the jurors aforesaid, upon their oaths aforesaid, do say that the said George Travers, the said James McKim then and there in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, against the peace and dignity of the United States of America, and against the form of the act of Congress of the United States, in such case made and provided.

HENRY HOMES, FOREMAN.

GEORGE BLAKE, DISTRICT ATTORNEY.

The facts of the case appeared by the evidence as follows: On the evening of the 27th November, at about an half or three quarters of an hour antecedent to the fatal event, the prisoner, who had been a marine in the service of the United States, but whose term of service had a short time previously expired, was, with several of his comrades, engaged in the sport of casting snow balls at each other, in the Navy Yard at Charlestown. In the course of this recreation, a person by the name of Stocker accused the prisoner of having unfairly concealed a brick-bat in a ball of snow which he had thrown at him. The prisoner denied the charge. A tumult arose—several blows were exchanged between

the prisoner and Stocker: others of the party were soon involved in the affray, and a considerable conflict ensued. Notice of the affray was soon communicated to the principal officer of the guard. A quarterly sergeant appeared, and ordered the wranglers to desist, and threatened to make known the circumstance to the orderly sergeant. High words and blows were still continued, whereupon the sergeant immediately called at the room where the quarrel was going on, and ordered the principal persons who had been engaged in it to the guard house. Stocker, and a person by the name of Livre, obeyed the order without hesitance; but the prisoner remained behind under a pretext that he wanted to take a blanket and some clothes from his bunk: while the sergeant, with Stocker and Livre, were gone to the guard house, a few paces only from the apartment in which the quarrel had originated, the prisoner was heard to declare, and several times to repeat the declaration, that he would not be taken alive to the guard house; that he would be the death of any man who should attempt to force him thither; and immediately retired to a corner of the room, where a number of unloaded muskets had been left in the racks, and taking from a cartridge box, hanging above, two cartridges, he put one of them into a musket, and propelled it down by striking the breech of the gun forcibly upon the hearth—with the other cartridge, after biting off the end, he deliberately primed the gun, and brandishing it about the room, declared repeatedly that he would kill the first man who should approach him. While the prisoner was in this situation, and within five or six minutes after, Stocker and Livre were sent to the guard house; the orderly sergeant McKim and Hasey, accompanied by sergeant Geary, entered the

BOSTON,  
Dec. 1814.

U. States  
v.  
Travers.

BOSTON,  
Dec. 1814.

~~~~~

U. States

v.

Travers.

room: the prisoner instantly accosted them, directing his musket towards the door by which they entered, and saying, sergeant McKim, stand off; if you approach me I will take your life. Geary, with his sword, parried the gun as it was pointed at him, and it was then directed towards McKim, who, being unarmed, endeavoured to parry it with his hand. At this moment the prisoner, being nearly in contact with the wall behind him, drew back the musket a few inches; and pushing forward again towards, and within an half foot of McKim's breast, discharged the piece, and thereby instantly destroyed the lives of McKim and Hasey.

The question was, whether this was murder or not.

Davis, J. Gentlemen of the jury—The time which has been occupied in this trial has not only given opportunity to have fully presented to you all the facts and principles which have a bearing on the subject upon which you are to decide, but must, also, have had a beneficial tendency to produce that state of mind which it is desirable should be possessed by those who have an agency in the administration of justice.

The evidence, which you have heard, discloses a transaction of a nature to excite great emotion. This ought not to be wholly suppressed, but may require regulation and discipline. Excitement and indifference are both to be avoided. There is a just interest in the melancholy subject, which all should feel; but a correct discharge of your duty requires a mental exercise, attention and discrimination, for which calmness and composure are obviously requisite.

A question has been made, by the learned Counsel for prisoner, as to the jurisdiction of the Court. This is, in its nature, a preliminary question; for if the court have not jurisdiction of the offence alleged in the indictment, it would be superfluous to proceed in the inquiry relative to the guilt or innocence of the prisoner. The objection rests on the terms of cession; by the Commonwealth to the United States, of the ground occupied for a Navy Yard. The act authorizing the purchase of the tract of land in question, limited the quantity to 65 acres, and preserved a concurrent jurisdiction with the United States—so far as that all civil, and such criminal processes as may issue under the

authority of this Commonwealth against any persons charged with crimes committed without the same tract of land, may be executed therein. The Government has been called upon to prove a purchase, corresponding to the terms of the consent, on the part of the Commonwealth. The occupation of the place, by the United States, for many years past, is of public notoriety; but the deeds of conveyance have also been produced; and to remove any uncertainty, as to the quantity of land, you have had the testimony of the Surveyor, Mr. Tufts, who was employed on the occasion, testifies, that the whole quantity purchased by the United States was somewhat less than forty acres. If the evidence should render this objection untenable, it is farther contended, that the reservation made by the Commonwealth does not leave that sole and exclusive jurisdiction in the place, which the law of Congress, relative to criminal offences, requires, in order to give this court legal cognizance of the offence charged in the indictment. The object of the condition, annexed to the cession, is obvious. It was to prevent the place from becoming an asylum for fugitives from justice. By a late decision in the Supreme Court of Massachusetts, it is determined that officers, proceeding to take the benefit of the provision act under the authority of the United States, and that offences committed in a territory ceded with such reservation, are not punishable by the Courts of the Commonwealth.* I am satisfied that this Court has jurisdiction upon the alleged offence, and that you should disregard the objection. This being a mere question of law, it is proper that you should be governed, in relation to it, by the opinion of the Court. If the direction should be erroneous, any verdict, which you may render, will not be conclusive against the prisoner in regard to this objection. It may again be brought directly before the court, and sustain a more thorough investigation.

I proceed to the other points presented in the examination and argument. The testimony of the witnesses has been very distinct and deliberate. There is little complexity in the story, and the facts are of a nature to be deeply impressed upon the memory. I shall not undertake to recapitulate the testimony, but shall state the principles by which you are to be guided and governed. In doing this, there must, necessarily, be occasional reference to what may be considered as proved; but you will recollect, that in respect to the evidence, you are the sole and exclusive judges.

* 8 Mass. Rep. 72.

BOSTON,
Dec. 1814.

U. States.
v.
Travers.

BOSTON,
Dec. 1814.



U. States
v.
Travers.

You are first to be satisfied of the fact of killing, and are to inquire, whether the deceased came to his death by the instrumentality of the prisoner. To this point you have the evidence of several of the associates of the accused, and of sergeant Geary, who testify as to the loading of the gun by the prisoner, the manner of its discharge, and the fatal effect. You have, also, the testimony of Dr. Bartlet, who was immediately called, who found McKim lying dead, on the spot where he fell; the body, he says, was perforated, in the direction of the lungs; the wound was, in his opinion, a gunshot wound; and, he has no doubt, was the cause of his death.

Whenever the fact of killing is proved, the law presumes it to be founded in malice, until the contrary appear; and, of course, all circumstances relied on in justification, excuse, or mitigation are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him. It is contended, that there are circumstances of such description in this case. You have heard them urged, and argued, and replied to with much ability. To enable you to form a correct judgment of the transaction, and to determine its proper character, it will be necessary that you should carefully compare the evidence with the rules and principles of law relative to homicide. This may present difficulties, but, it may be presumed, not insurmountable. You are, indeed, in a situation, in which it is most important that you should think and reason with precision.—Popular, or even philosophical ideas on the subject, which the law has not sanctioned, or which are incompatible with its requirements, should not be allowed to prevail. You are to attend to legal language, and to adopt it in a legal sense. This, however, will not be found repugnant to the dictates of a plain understanding, considerably exercised; and our law of homicide, rightly understood, will, I trust, be approved by every intelligent person, as founded on a just survey of the principles of human nature, punishing malignant violence or culpable negligence, and yet reasonably accommodated to cases of necessity, and accident, and various exigencies incident to social intercourse. Of homicide, or the killing of any human creature, there are two grand divisions—that which is felonious, and that which is not felonious.

Homicide, not felonious, is either justifiable or excusable. It is convenient, in considering the subject, to regard this subdivision; though now, the legal result to the party on trial is the same, whether the homicide be justifiable or excusable. In either case he is to be acquitted.

ed to the higher grades of justifiable homicide, a kill-
mand, or requirement of law, as in the execution of
or in advancement of public justice, or in the en-
rrests, where the officer is resisted, it is not ne-
arly to remark in this case. The defence is not
ound.

BOSTON,
Dec. 1814.

United States
v.
Travers.

justifiable in self-defence, and is permitted
one who manifestly intends and endeavours
rise, to commit a known felony on the
or property of the party killing. Thus,
commit a robbery, murder, or burglary may be
with force; and if, in the conflict, the invaded per-
should happen to kill the assailant, such killing is justifica-
ble. So also it is in defence of chastity. But it is not every
manner of force, though wrongful, which will justify killing.
The rule is, that where a crime, in itself capital, is endeavour-
ed to be committed with force, it is lawful to repel that force
by the death of the party making such attempt; and that the
law will not suffer, with impunity, any crime to be prevented by
death, unless the same, if committed, would also be punished
with death.

You will compare the evidence with this criterion. From
the several witnesses who were present, you learn the de-
clared purpose of the interference by the deceased, accom-
panied by sergeant Geary. You have it also from sergeant
Geary himself. If you should be satisfied that the only ob-
ject on their part was to quell a broil in the barrack, that no
felony was threatened or contemplated, and that the only injury
or inconvenience intended, or which could, under the circum-
stances, be apprehended by the prisoner, was arrest and con-
finement, then it is certain that the killing for such cause, or to
prevent such a consequence, is not, in contemplation of law, jus-
tifiable.

Excusable homicide is that which occurs by misadventure, or
in self-defence, under particular circumstances, distinguishing
it from justifiable homicide from a similar motive.

Homicide by misadventure is, where a person doing a law-
ful act, without any intention of hurt, unfortunately kills an-
other. The instance often mentioned in our books, that of the
head of a hatchet flying off, when a man is at work with it, and
killing a bystander, is sufficient to illustrate the principle.
Cases of this sort, unfortunately, are not of unfrequent occur-
rence. Where the act is lawful, and the effect is merely acci-
dental, the party in some measure instrumental of the death, is
held excusable, and is rather an object of compassion than of
punishment.

BOSTON,
Dec. 1814.

United States
v.
Travers.

The homicide in self-defence, which is considered, in law, as excusable, rather than justifiable is, that whereby a man may protect himself from an assault, in the course of a sudden casual affray or quarrel, by killing him who assaults him. In such case the law, however, requires of the party to have quitted the combat before a mortal wound shall have been given, to retreat, as far as he can with safety, and at last, to kill from mere urgent necessity, for the preservation of life, or to avoid enormous bodily harm.

From the essential characteristics of excusable homicide, it will appear that if you should, as before mentioned, find from the evidence, that the prisoner could reasonably apprehend, from the deceased, nothing more than arrest and confinement, then the killing, under such circumstances, cannot be considered as excusable homicide. It cannot be excusable by misadventure; for there it is essential that the party killing should be in the exercise of a lawful act. It cannot be held excusable in self defence, because, if such be the evidence, of which you are the judges, there was, of course, no danger of the prisoner's life, or of such enormous bodily harm as would render the killing excusable.

It is contended for the prisoner, that the discharge of the musket was accidental. That there is no evidence, or not sufficient evidence of a voluntary act of the prisoner to effect it; but that the lock was sprung, either by the blow from sergeant Geary's cutlass, or from the grasp of the gun by the deceased, the instant before it was discharged.

In regard to this point, you will consider the evidence, and settle, in your own minds, the question whether from the whole conduct of the prisoner, relative to the death of McKim, you can and must infer that he actually discharged the gun which he had loaded and levelled with a deadly or dangerous direction.

Mitchell, to whom the gun belonged, says that the spring of the lock is a stiff one. The same remark is made by sergeant Geary, who examined the gun in your presence. You have also seen the gun stock and grasped, in representation of what took place on that melancholy evening when Mr. McKim fell. If you should think it necessary, you may pursue this examination farther by an examination of the piece, and on the whole evidence on this head, will come to a conclusion, as to the probability of the supposition advanced on the part of the prisoner. But I must here observe, that if you should embrace the explanation, which has been offered for the prisoner, in this particular, you will then have to consider its legal applicability. Such explanation, if admitted, can-

not avail to characterize the case as excusable, by misadventure, unless all the conduct of the prisoner, connected with the supposed accidental act of the discharge of the gun, were lawful. Now, if it was lawful to kill for avoiding or repelling the purposes for which the officers interposed, it would also be unlawful to load the gun, and to wield and point it in a dangerous direction, from which death or some serious mischief would be likely to ensue. If such appear to be the conduct and views of the prisoner on that occasion, he cannot be considered as in the exercise of a lawful act, and though the discharge of the gun in such case be admitted or proved to have been done without the actual drawing of the trigger by the prisoner, still the proceeding could not be referred to the head of homicide by misadventure, on account of the unlawful acts which were concomitant.

BOSTON,
Dec. 1814.

United States
v.
Travera.

Bringing the evidence to the test of these principles, if you do not find the act done by the prisoner justified by the command or permission of law, or excused on account of accident or self preservation, it must, of course, fall under the remaining division of homicide, and be considered as felonious.

Felonious homicide, which is defined to be the killing of any human being, without justification or excuse, is divisible into manslaughter and murder. 3d. felonious.

Manslaughter is the unlawful killing of another without malice express or implied, and it may be either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act.

I shall not undertake, on this occasion, to specify the various instances of manslaughter; such as should have no relation to the case on trial, might only tend to perplex and embarrass you in your inquiries. Those grounds of defence, which have been relied on, as bringing the offence within this description of homicide, will be considered. First, it is alleged, that the killing of the deceased, was in resistance of an unlawful arrest. Homicide in resisting an arrest substantially illegal, will, at most, amount only to manslaughter. To judge of the validity of this defence, we must consider the situation of the prisoner, and the circumstances under which he acted.

According to the testimony of Capt. Anderson, the prisoner had been five years a soldier in the marine corps, in the service of the United States. The term of his engagement expired on the 22d of September last, about two months before the transaction for which he is on trial. He had repeatedly applied to his commander for his discharge, but could not obtain it. For a time the reason assigned was, that

BOSTON,
Dec. 1814.

United States
v.
Travers.

some necessary document had not been received from Washington. Afterward, and before the unhappy occurrence referred to, that document was received. Still the discharge was delayed. Under these circumstances, the situation of the prisoner seems to have been equivocal, and, in a degree, irritating. Capt. Anderson says, that he considered him as a volunteer waiting for his discharge, entitled to pay and rations; and that he was occasionally called upon to do duty. I do not recollect whether he was considered as compelled to perform military duty; but it appears that he was considered liable to military discipline, and had been confined, since his time expired, for some alleged misbehaviour.

From want of sufficient information relative to military questions, I may have some misconceptions on this subject. Captain Anderson observes, that he did not consider the prisoner at liberty to depart from the station, under these circumstances, without leave. But I should apprehend that in this he is not correct. The prisoner might have been exposed to some inconvenience, suspicion, or loss of other employment, if he had departed without the usual certificate; and this consideration, probably, induced him to remain, though with reluctance, and as appears, with resentment. It is to be regretted, that he met with this embarrassment, and that a soldier, whose term of service was accomplished, should be thus retained in a situation so questionable and tending to create difficulties and disgust. In justice to Capt. Anderson, it is proper to suggest a circumstance, from which it may be inferred, that he was not influenced by any unkind or injurious motive in his proceedings. Though dissatisfied with the prisoner's deportment in several instances, it was his intention, he says, to aid him in an application for a pension, on account of some disability incurred in the service. This intention, it appears, he had communicated to the prisoner. Notwithstanding the peculiarity of the prisoner's situation at the Navy Yard, and admitting that his residence there was, in a degree, involuntary, or that he was an injured man, still, while thus remaining, he was subject to certain obligations incident to his situation, and he certainly was not at liberty to commit acts of disorder and violence with impunity. His attempts or efforts to leave the place, if efforts were necessary, must, I think, be allowable. If resisted or opposed in such attempts, and violence, or even death had ensued in consequence, it is not necessary now to say how such an occurrence would have been considered. I would hope that no officer would have the temerity to try the experiment. But you will judge, gentlemen, from the evidence, whether the transactions of the evening, which ter-

minated in the unhappy death of sergeant McKim, had any reference to such attempt to assert and regain his liberty by the prisoner, or whether they did not merely relate to a quarrel or affray, in which he had participated. The duties of the sergeants, and particularly the orderly sergeant, and of this description was the deceased, have been stated to you. It will, I presume, be admitted, certainly it has not been disputed, that the sergeants might and ought to interpose in the manner and to the extent which they did, in reference to men belonging to the corps, upon the occurrence of a violent affray. Was the prisoner, as he was then situated, also subject to such interposition or restraint? In my opinion he was, while thus remaining in the barracks, subject to the necessary rules of the establishment for the preservation of peace and order. He cannot, though he should be considered as an injured man, violate those rules, always excepting, as before mentioned, any act or exertion, the direct object of which should be to depart from the place. There are offences which no one would say he could commit and not be subject to restraint, such for instance, as setting to the magazine, or attempting to excite mutiny among the troops. The same may be said of a seaman, who may not have received his pay and discharge according to contract. He may not be liable to duty, though continued in the ship, but there are crimes and disorders essential to be prevented which he could not commit with impunity, and immediate safety and security of life and property might require that he should be subjected to discipline and restraint. If a mere visiter had been in the barracks on that evening, with or without permission, and had been concerned in the affray, he would, in my opinion, have been liable to be put under guard; and if you should be satisfied, from the evidence, that the prisoner was, on that evening, engaged in a brawl, quarrel, or affray, it was, in my opinion, the right and duty of the sergeant to interpose and quell such disorders, and to subject to usual military restraint all who were concerned in it, including the prisoner.

Your attention is called, by the Attorney for the government, to some special reasons for securing the prisoner; from the circumstances testified relative to the bayonet with which he armed himself in the affray, and the information communicated by the boy to sergeant Todd, that the prisoner had loaded a gun.

It is farther urged, that there was an assault on the prisoner, referring to the manner of sergeant Geary's approach, and his striking, with his cutlass, the gun with which the prisoner was armed, and in the same connexion, your atten-

BOSTON,
Dec. 1814.

United States
v.
Travers.

BOSTON,
Dec. 1814.

United States
v.
Travers.

tion is called to the language used by sergeant Geary to the prisoner.

According to the testimony of John Hassell, who reports the language of the deceased as he approached the prisoner, it would appear to have been sufficiently mild. Sergeant Geary's expressions were more harsh, and, if words could be of any material import in the case, your attention might properly be employed in deciding what language or mode of address was best suited to the occasion, and whether the manner in which sergeant Geary accosted the prisoner was or was not adapted to make the desired impression and induce his submission. But the rule of law is, that mere words, though reproachful, are no defence in case of homicide, and will not alone constitute a provocation sufficient to free the party killing from the guilt of murder.

Where a man, in the lawful pursuit of his business, is assaulted, and kills the assailant, it may be manslaughter or justifiable homicide, according to the weapon used in the assault, or the danger to be apprehended; but a rightful application of force, against the party killing, can never be considered as an assault. If sergeants Geary and McKim might rightfully interfere, under the circumstances proved, to disarm and to restrain the prisoner, then the sudden and forcible stroke, by which sergeant Geary directed the gun from its dangerous aim at his body, cannot be viewed as an assault, but as a necessary operation for his own defence and protection. Of the legality and propriety of those officers' proceedings, I have already remarked, and shall not enlarge on that subject.

If the gun was discharged by means of the stroke given by sergeant Geary, and in the instant of the change in its direction by force of the blow, the consequent death of sergeant McKim by its discharge, would on such supposition be an involuntary act on the part of the prisoner, but would not change the character of the offence, if the prisoner were in the exercise of an unlawful act. If the offence would have been murder or manslaughter, supposing sergeant Geary to have been killed, it would be the same in regard to the death of McKim.

The agency of the deceased, in producing the effect, by grasping the gun, or the stroke given by sergeant Geary, can make no difference, provided those officers are to be considered as lawfully employed on that occasion, and the prisoner in the exercise of an unlawful act. If a man, liable to arrest, should arm himself with a hair spring pistol to resist an officer, having a right to make the arrest, and such officer should

be killed in the attempt, by the discharge of the pistol, at the moment of contact, it would be no defence to say that his access to the fatal instrument had produced his death. And when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in the prosecution of a felonious intent, or if in its consequences it naturally tended to bloodshed, it will be murder, but if no more was intended than a mere civil trespass, it will only amount to manslaughter.

The remaining ground of defence under this head is, that the killing was upon a sudden affray and in heat of blood, and thus reducible to manslaughter.

If upon a sudden quarrel two persons fight, and one of them kills the other, it is manslaughter; and so it is if they should on such occasions go out, by agreement, and fight in a field. There would, on such supposition, be some intervening space between the commencement of the dispute and the actual combat, but the law considers it as one continued act of passion; "And," say the authorities, "pays that regard to human frailty, as not to put a hasty and deliberate act on the same footing with regard to guilt."

It appears by the evidence, that there was, on the evening when Mr. McKim was killed, and just before the occurrence, a quarrel or affray in the room occupied by the prisoner and some of his associates. The circumstances of that affair you will recollect. If a death had ensued on that occasion, from a wound inflicted by one of the combatants on another of them, for instance, with the bayonet seized by the prisoner, it might have furnished a case, which the law, in benignant consideration of human infirmity, would consider as manslaughter. The indulgence which the law extends to cases of this description is founded on the supposition that a state of sudden and violent exasperation is generated in the affray, so as to produce a temporary suspension of reason, and that the transport of passion excludes the presumption of malice. But if you should find, from the evidence, that the affray between the original combatants was at an end, a question will then arise whether the law will extend such benignant consideration of the offence, to a state of passion thus excited, when directed against persons who had no agency in giving the provocation. There are instances of such transfer. Innocent and well disposed persons interposing to quell riots or affrays, may happen to be killed in the attempt. Such killing, though of persons thus laudably employed, may amount to manslaughter, from the heat of passion excited, and from

BOSTON,
Dec: 1814.

United States
v.
Frawley.

BOSTON,
Dec. ' 1814.

United States
v.
Travers.

the party killing not being able to discriminate, but imagining that they came to take part in the affray. But when officers, or those who have a right to interpose to quell riots and affrays, do interpose for that purpose, and their object is declared and known, and they are resisted, and killed in such resistance, it is murder in the persons thus resisting and killing. In regard to the limitations of this indulgence to human infirmity on sudden provocation, time is an important circumstance. Even as relates to the person giving the provocation and the immediate object of resentment, "if there be a sufficient cooling time," to use the language of the books, "for passion to subside, and reason to interpose, and the person so provoked kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder."

You will consider the evidence, in this case, as to the time which elapsed between the affray and the intervention of the deceased. The Attorney for the Government has called your attention to other circumstances appearing in evidence, manifesting, as it is argued, the assumption of new views by the prisoner, and a deliberate design to accomplish an unlawful and felonious purpose. Such are the loading of the gun, the manner of loading it, and the accompanying declarations and conduct of the prisoner. Whether the killing shall be mitigated to manslaughter will depend on your views of the evidence with reference to the legal doctrines which have been stated. A killing in one continued state of passion arising merely from the excitement in the affray, and without circumstances implying malignity of heart, may be considered as manslaughter. But if it should be your opinion, from the evidence, that there was sufficient time for passion to subside, and for reason to interpose; if the prisoner had, or might, under the circumstances, be reasonably supposed to have sufficient self-possession, notwithstanding the excitement, to know the officers and their object, and the purpose of their interference; and, especially, if he was master of his temper, at the time, so as to adopt and cherish new and improper views and purposes, not immediately connected with, or excited by the previous quarrel, the act of killing, under such circumstances, could not, I conceive, be mitigated to manslaughter, on the ground of sudden heat from the previous affray. What was his actual state of mind, and all the circumstances appearing in evidence on this point, you will consider.

If you should find, from the evidence, that the killing was unlawful, and should not consider it as mitigated to manslaughter, on the grounds suggested in the defence, it will then fol-

low, that the offence is of the description alleged in the indictment, and must be considered as murder. The crime of murder has this essential ingredient to distinguish it from manslaughter, that it arises from the wickedness of the heart, denominated by the law, malice aforethought.

The malice intended by this expression, as has been observed, is not merely spite or malevolence to the deceased in particular, but an evil design in general; the dictate of a wicked, depraved and malignant spirit. It may be malice *expressed*, and be manifested by deliberately formed designs or declarations; or malice *implied*, to be inferred from such circumstances as carry in them the plain indications of an heart regardless of social duty, and fatally bent on mischief.

The doctrines of the law on this, as well as the other branches of homicide, have been read to you. I do not think it necessary for me to detain you with any farther observations.

BOSTON,
Dec. 1814.

U. States
v.
Travers.

Story, J. Gentlemen of the Jury—It is not without reluctance that I address you. I am so entirely satisfied with the charge of my learned brother, and so entirely subscribe to his doctrines, that nothing farther seems necessary to be said on this melancholy occasion. As, however, the present is a capital trial, and the government and the prisoner have in some sort a right to a full expression of my opinion, and as my brother also wishes it, I will detain you for a short time, while I examine the law and the evidence, which are the proper guides for your decision.

I will in the first place give you a summary of the facts. [Here followed a statement of the material facts.]

Upon the point of jurisdiction, I do not entertain any doubt. It is unnecessary to trouble you with the reasons of this opinion; but you will consider it as our decided opinion, that if the land where this transaction happened, had been duly conveyed to the United States, (of which there is no dispute between the parties) the jurisdiction of this court to try the offence is clear. The offence in the sense of the law was committed in a place "under the sole and exclusive jurisdiction of the United States.

I will now proceed to lay before you a general view of the principles of law, as to the subject of homicide.

Homicide is either justifiable, excusable or felonious.—It is justifiable when the act is done from some unavoidable necessity, or for the advancement of public justice, or for the prevention of some atrocious crime. Such as the execution of a criminal convict, and the killing of a person who attempts to rob, murder or commit some other atrocious felony upon the person or property of another.

It is excusable, when it happens by misadventure, or in self-defence. By misadventure, when in doing a lawful act, a person by accident kills another, having used proper precaution to prevent danger. In self-defence, commonly so called, where upon a sudden affray death ensues from necessity, but the necessity is in some

BOSTON,
Dec. 1814.

U. States
v.
Travers.

measure founded upon the fault of the party who urges it in his excuse.

It is felonious, in legal contemplation, when it amounts to manslaughter or murder.—Manslaughter is the unlawful killing of another, without malice express or implied; and it may be voluntary, as upon a sudden heat of passion, or involuntary, as when it happens by accident in doing acts which are either unlawful in themselves or are attended with want of due care and circumspection to prevent mischief.

When death ensues upon a combat in a sudden quarrel without malice prepense, such act amounts to voluntary manslaughter, being attributed to heat of blood arising from human infirmity. In order to reduce such offence from manslaughter to excusable self-defence, it is incumbent on the party to prove two things.—1. That before a mortal stroke given he had declined any farther combat, and had retreated (if he could) as far as he might with safety.—2. That he then killed his adversary through mere necessity in order to avoid immediate death. And in these two circumstances consists the true criterion between manslaughter and excusable homicide.

Murder, a crime at which nature shudders, consists in the unlawful killing of another with malice aforethought. It is this malice which distinguishes this crime from every other kind of homicide; and it may be express or implied from circumstances.

Malice in legal intendment is not confined to that depraved and deliberate determination, where the mind has brooded over its prey and marked out its vengeance in cool blood, or with wicked cunning. Such as are cases of death produced by poison deliberately administered, or by midnight and solitary assassination. But the true legal notion of malice extends to all cases of homicide perpetrated under such circumstances of wanton cruelty and implacable revenge as evidently to flow from a wicked, malignant and abandoned heart, or as Sir Michael Foster expresses it, "a heart regardless of social duty and fatally bent on mischief." If, therefore, upon a sudden provocation of a slight nature one beat another in a cruel and unusual manner so that he dies, though he did not intend to kill him, it is murder by express malice. So if upon such a provocation a person inflict with a dangerous weapon a punishment utterly disproportioned to the offence, if death ensue, it is murder. Much more will it be murder if upon such a sudden provocation a party fires a loaded gun at another with intention to kill and actually accomplishes his purpose. And if the provocation was even ever so great, and the party has had time to deliberate and cool, and he afterwards kills his adversary, it will be murder. The true consideration in all these cases is whether the party has at the moment of the death acted under the impulse of passion excited by immediate injuries of a serious nature, or has given himself up to a blind and cruel revenge, regardless of consequences, and bent only on the accomplishment of its own malignant purposes.

Such is the general outline of the various legal grades and distinctions of homicide. It will be necessary, however, to repeat and enlarge upon such of these principles as the facts of the unhappy case before you may require to be more distinctly examined;

and in my subsequent remarks I shall confine myself to such considerations only as are immediately applicable to the defence asserted in behalf of the prisoner.

The counsel for the prisoner contend, that this is a case of justifiable, or excusable homicide, or of manslaughter.

Was it justifiable?—This upon the facts can be asserted only, if the prisoner in defence of his person to prevent a known felony with force against his person, committed the act. If therefore Geary or McKim at the time of the affray intended to murder, rob, or do some enormous bodily harm to the prisoner, and he to repel this felonious attempt killed McKim, then it was a strictly justifiable homicide. If no such felony was intended, then it falls under a different consideration.

Was it excusable?—This must be by misadventure or in self defence. Misadventure exists where a man doing a lawful act without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately kills another. Can this definition apply to the prisoner's case?—Had the prisoner no intention to kill? Did he use proper precaution to avoid any danger to life? Did he kill McKim by mere accident without fault?

Was this excusable homicide in self defence?—This may happen when upon a sudden combat blows have passed between the parties, and one of them in order to avoid immediate death, or some bodily harm, or acting under an impression, formed upon reasonable grounds, that such was the necessity, kills his adversary. He is supposed to kill his adversary under the impression of an absolute necessity so to do in order to save his own life; and it differs from justifiable self defence, properly so called, in this, that the necessity has in some measure arisen from his own fault. But if the party killing is not in any supposed or real imminent danger of his own life, if it was not necessary in order to save his own, that he should take the life of his adversary, then it is not excusable homicide; but it falls under the legal consideration of manslaughter. Apply these principles to the facts before you: At the time of firing the gun, did the prisoner believe that he was in imminent danger of his own life from an assault and injury intended by Geary or McKim? Did he, acting under such belief, kill McKim from necessity to save his own life? If not, then he cannot protect himself under the plea of excusable homicide.

Was this a case of manslaughter? The prisoner's counsel contend that it was not a crime of a higher grade, because it was killing upon an assault from heat of passion upon a reasonable provocation.

It is clear that no words of reproach, how grievous soever, will excuse a man for killing another. Nor will any trivial provocation which in point of law amounts to an assault, nor even a blow, of course reduce the crime of the party killing to manslaughter. For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner, or in the continuance, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal malignity than of human frailty. It is one of the true symptoms of what the law denominates malice, and therefore the crime will amount to murder, notwithstanding

BOSTON,
Dec. 1814.

U. States
v.
Travers.

BOSTON,
Dec. 1814.

U. States
v.
Travers.

such provocation. Barbarity will often make malice. This is the language of the most approved authority.

For cases of this sort, much also depends upon the weapon or manner of chastisement; for if it be one which immediately endangers life, as a loaded gun, and it is used with brutal violence upon a slight injury, to produce death, the party will be guilty of murder. But if from all the circumstances, the act may fairly be attributed to an intention not to kill or dangerously to wound, but to chastise, or repel the aggressor, and therefore as not proceeding from a cruel and implacable malice founded on a spirit of revenge, it will amount but to manslaughter.

Farther—There must not only be a reasonable provocation, but the act must be done in the transport of passion and heat of blood. For if there have been an opportunity to cool; if there have been time to pause and deliberate; if other objects have intervened, or if there be evidence of express malice, the crime will be inflamed into the atrocity of murder.

Farther—There must not only be a reasonable provocation, and the act be in the transport of passion and heat of blood, but it must be kindled upon reasonable provocation, or under reasonable circumstances of excuse *as to the party killed*. For if a man have a sudden quarrel, and fight with A. by which his passions are strongly excited, and while his passions are thus excited, he without any supposed or real provocation kill B. who is an utter stranger to the whole affair, and has not interfered in the quarrel, nor been in any way connected therewith, even in the party's own supposition, it will be murder. The law never contemplated that merely because a man had given himself up to a transport of passion upon a real injury, he is therefore at liberty to wreak his vengeance upon innocent persons, who have never offended him. Such conduct is rather a proof of that wicked, depraved and malignant spirit which the law deems malicious; and it cannot be extenuated under the pretence of violent passion. Upon this principle, if upon a sudden affray a stranger interfere to part the combatants, and give reasonable notice that such is his intention, and that he means only to keep the peace, and not to interfere in the quarrel; and in so doing is killed by either of the combatants, it is murder;—but if he so interfere without giving reasonable notice of his intention, and be killed, it cannot be more than manslaughter.

Apply these principles to the facts of the present case. When Geary and McKim came to the barrack where the prisoner was, did they, or either of them unlawfully assault or strike, or attempt to strike him? Did they come in the opinion or the knowledge of the prisoner merely to disarm him of his deadly weapon, to restore peace, and suppress the affray? Was the striking of the gun, held by the prisoner, by Geary, to repel an intended injury to himself, and not to injure the prisoner? Was the object of McKim in seizing the gun, and attempting to seize the prisoner, merely to disarm him, or to inflict a serious injury upon him? Even supposing Geary and McKim acted without justifiable cause, was the punishment inflicted by the prisoner outrageously disproportionate to the offence? These are some of the questions which you must ask yourselves before you can decide upon the correctness of the prisoner's defence on this point.

Was this a case of manslaughter to prevent an unlawful arrest? If a person unlawfully arrest or hold another under restraint, and the latter to get rid of such arrest or restraint, kill his adversary without necessity the crime does not amount to murder. If the arrest or restraint be under lawful authority, it will be murder. But an unlawful arrest or restraint, which is neither felonious nor dangerous to life, will not justify or excuse the homicide—it will at least be manslaughter.

In this view it will be necessary to consider the prisoner's situation; and how far the interference of Geary and McKim to arrest or restrain him was lawful.

And in my judgment it is very clear that the prisoner was in point of law entirely discharged from the marine service. His term of enlistment had expired, and he was not compellable farther to do military duty. If, indeed, he had before the expiration of his term of service, committed a military crime, for the purpose of trying such offence, an arrest or restraint might have been justifiable. None such is pretended in this case. If, therefore, he had been restrained of his liberty, or prevented from leaving the navy-yard, the detention would have been illegal. He might, by a habeas corpus to this court, have been liberated; and might well have maintained an action for damages. If, under such circumstances, he had attempted to depart from the navy-yard, and had been forcibly prevented, he would have had a right to repel force by force, and if necessary, to have taken the life of his opponent. And if he had been killed in this attempt to recover his liberty, it might under circumstances have been murder in the perpetrator.

But although the prisoner was thus in contemplation of law discharged, yet he might remain, if he and the officers of the garrison pleased. He might remain in expectation of his pay or of a pension, or of a certificate or discharge, which should be a voucher of his good behaviour, and of his having left the garrison without desertion. And if he chose to remain, (however reluctantly), and to perform military service partially, until he could obtain a regular discharge, or receive his pay, although not a soldier, he was undoubtedly liable, in a limited degree, to the regulations necessary to the peace and subordination of a military garrison. And even if he was unlawfully detained, or remained under an erroneous impression that he was bound so to do, this would not authorize him, in collateral things, to violate the laws. For even an unlawful detention will not authorize a man to perpetrate crimes against innocent persons, or on other occasions, disconnected with his attempts to recover his liberty. You will, therefore consider what was the actual situation of the prisoner at the time of this melancholy occurrence. You will judge whether he was a voluntary resident in the barracks, or at least a reluctant submissive subject, or was then under the effect of peaceable physical restraint, which attempted to withhold him from liberty.

But supposing him to be in the most favoured condition, and entitled to all the rights of a stranger; still in a military post or garrison, every person who is voluntarily there either as a visitor or guest is bound to observe peace and order, and to conduct himself inoffensively. If he excite a riot, if he attempt to stab or wound or kill any one within the lines, he is liable to be arrested and detained until he can be placed in the hands of the proper tribunals

BOSTON,
Dec. 1814.

U. States
v.
Travers.

BOSTON,
Dec. 1814.

U. States
v.
Travers.

having jurisdiction to punish him. It is not competent for these military officers in such case to apply imprisonment by way of punishment; but it is their duty to apply it, if necessary, to prevent bloodshed, and restore peace, and to keep the offender to answer over to a competent tribunal.

Farther—If a party be under a supposed military constraint in a garrison or post, as to all other cases not affected by that restraint, he must be subjected to the rules which are essential to preserve the rights of other persons. It would be subversive of all the principles of justice to allow a man in such a predicament to murder or wound any innocent person, who was in the garrison, and who was in no shape instrumental in his imprisonment. Surely no person could justify such an act; or the blowing up of the magazine, or the burning of the buildings, because he was there against his own wishes.

You will attend to all the circumstances of this case, and apply to them the principles which I have stated. It is admitted on all sides, that it was the duty of Geary and McKim to preserve the peace of the garrison, and to prevent brawls and riots. You have heard the evidence. The prisoner was engaged in a brawl. He had seized a bayonet with an avowed or supposed intention to stab one of his comrades. He had loaded and primed his gun, and declared that he would kill any one that came near him. His comrades were alarmed, and carried information to the orderly sergeant. Under these circumstances, (if the evidence satisfies you of the facts,) it was lawful for Geary and McKim to interfere and suppress the brawl, and disarm the prisoner. He was in a great rage, and threatened violent injuries and outrages, and even death to those about him. It was in the night; and if the guard-house was a proper place of security, of which you will judge, it was lawful for Geary and McKim to arrest him, and carry him thither. They had no right to apply imprisonment as a punishment. But they had a right to secure him from doing farther mischief, and to confine him for a reasonable time, until he could be brought before a competent tribunal. If they intended no more; if they acted reasonably in the discharge of their duty; if the prisoner knew that this was their sole object, then you will consider how far the prisoner can shelter himself under the defence of manslaughter, as upon an unlawful arrest.

Before I quit the subject, I will barely remind you that, if taking all the circumstances together, you are satisfied that the prisoner perpetrated the act from express malice, or a previous deliberate intention to kill, he is guilty of murder, although he did the act upon a reasonable provocation. And the same is the law if the prisoner made the attempted arrest a mere cover to wreak his vengeance on the party who was killed, and acted with deliberate cruelty and malignity in the execution of his previous purpose.

You will weigh all the circumstances with care and tenderness towards the accused. You will allow every reasonable doubt in his favour. But a blind and visionary incredulity which refuses to be satisfied without the highest possible proof of the most minute parts, ought not to be indulged. Your duty to your country and to the prisoner requires you to act with caution, and in giving your verdict, to consult the honest dictates of your consciences.

Prisoner was found guilty of manslaughter.

MUNICIPAL COURT.

BOSTON, 1824.

The Commonwealth,
 v.
Richard Wentworth and
Thomas Daly. } LARCENY.

Present—Hon. *P. O. Thacher.*

The prisoners were tried on two indictments for larceny ^{Constructive} larceny.—one for stealing a silver watch and \$2 50 in money, from Simon Glines; the other for stealing a surtout coat and \$2 50 in silver change, from Joseph Whittier.

The prosecutors were young men without experience, who had lately come to this city, from the country, to seek employment. The defendants were associates in iniquity, well known on West Boston Hill; had been before convicted in this court of like offences, and had suffered the penal consequences of their guilt. Pretending to be strangers to each other, they prevailed on Glines and Whittier, in succession, to join them at the gaming table, where Daly, pretending to bet against Wentworth, persuaded them to join in the bet, at a game which was called the Ladies' Game. They were soon stripped of their property, but Daly immediately afterwards was seen in possession of a coat, which he apparently lost at the time. The game is played with cards, but at which the knowing ones never play with each other. It is their practice for two to combine together, to entrap and defraud a third, who is ignorant and unsuspicious of the fraud. The chance is entirely in favour of the person who holds the cards.

The judge instructed the jury, that to constitute the

BOSTON,
1824.

Com'wealth
v.
Wentworth
and Daly.

crime of larceny, the property must be taken fraudulently, and against the will of the owner. If the prosecutors agreed to play with the prisoners, and lost their property fairly at the game, they must be left to seek redress for their loss in a civil action, and the prisoners must be acquitted. But if the jury believed from the evidence, that the prisoners were confederated together, to deceive these ignorant young men, and that the game was a fraudulent plan to obtain their property; the delivery of the property by Glines and Whittier was not to be deemed voluntary on their part, and the taking it by the prisoners under such circumstances, was a felony.

The jury found the defendants guilty, and they were severally sentenced to suffer twenty days solitary imprisonment, and two years hard labour in the State Prison.

NOTE. It is often extremely difficult to draw the line of distinction according to a settled rule, between cases of constructive larceny and obtaining money upon false pretences. The colouring and shades of these crimes seem to run into each other. Where it is at all doubtful whether the crime charged is larceny or not, a conviction can be had in most cases for a misdemeanor at common law, or under the statutes of false pretences. The above case is no doubt supported by a number of English and American decisions. For example, in *Pear's case*, Leach. 353. it was decided that if a person obtain a horse, under pretence of hiring it for a day, and immediately sells it, the delivery of it to him by the owner, for that specific purpose, does not change the possession; and therefore, if the original hiring by the prisoner was with intent to steal it, he is guilty of larceny.

Patch's case, Leach, 273. The prisoner and two others had joined company with the prosecutor in the streets, and after walking a short space, one of them stooped down and picked up a purse, which upon inspection was found to contain a ring and receipt for £147, purporting to be the receipt of a jeweller for a rich brilliant diamond ring, and the prisoner proposed that they should go into a house and consider how they should divide the prize, which was assented to; and when there the prisoner asked the prosecutor, if he would take the ring, and deposit his money and watch as security, to return on receiving his portion of the value, to which he agreed, and signed a written agreement to that purpose, and that the prosecutor accordingly laid his watch and money on the table, and received the ring; then the prisoner beckoned the prosecutor out of the room, under pretence of

speaking to him in private, and that during that interval, the other two men went off with the property. The court, upon the authority of Pear's case, directed the jury to consider whether the whole transaction was not an artful and preconcerted scheme in the three men, feloniously to obtain the prisoner's watch and money; and the jury found him guilty. See Stone's case, New York Gen. Ses. Oct. 1817. 2 City H. R. p. 157. (See vol. 1. tit. Constructive Larceny.) But in the case of the King v. Nicholson et als. Leach, 698. it was held that if a person be induced to play at hiding under the hat, and stake down his money voluntarily on the event, meaning to receive the stake if he wins, and to pay if he loses, that on his losing, the winner taking up the stakes so deposited on the table, is not guilty of larceny, although the jury find that the whole was a fraudulent contrivance and conspiracy to get possession of the prosecutor's money.

BOSTON,
1824.

Com'wealth
v.
Wentworth
and Daly.

DISTRICT COURT, MARYLAND DISTRICT. BALTIMORE.

United States }
v } OBSTRUCTING THE MAIL, &c.
Mr. Barney. }

Present—Hon.—— *Winchester, J.*

Winchester, J. The indictment in this case, which charges the defendant with having wilfully obstructed the passage of the public mail at Susquehanna river, is founded on the act of congress of March, 1799.

The defendant sets up a defence and justification of this obstruction of the mail, that he had fed the horses employed in carrying the mail for a considerable time, and that a sum of money was due to him for food furnished at and before the time of their arrest and detention.

On this state of facts, two questions have been agitated.

1st. Whether the right of an innkeeper to detain a horse for his food, extends to horses owned by individuals,

The right of an innkeeper to detain a horse for his food does not extend to horses owned by individuals, and employed in the transportation of the mail. Nor to horses owned by the United States and employed in that service. No lien can exist against the government. A mail carrier cannot sue or retain.

BALTI-
MORE.U. States
v.
Barney.

the mail for his hire. He must apply to government, and if they refuse, the proper course is to petition congress. A stolen horse carrying the mail stage cannot be seized by the owner, so as to retard the mail. Nor can the mail be obstructed by arresting the driver for debt.*

and employed in the transportation of the public mail.

And,

2d. Whether such right extends to horses belonging to the *United States*, employed in that service.

The first question involves the consideration of principles of some extent, and to decide correctly on the second, it may be necessary to state them generally.

Lien is defined to be a tie, hold, or security, upon goods or other things which a man has in his custody until he is paid what is due him. From this definition it is apparent that there can be no lien where the property is annihilated, or the possession parted with voluntarily and without fraud. 2 Vern. 117. 1 Atk. 234.

The claim of a lien otherwise well founded, cannot be supported, if there is

1st. A particular agreement made and relied on. Sayer's Rep. 224.

2d. Where the particular transaction shows that there was no intention that there should be a lien, but some other security is looked to and relied on. 4 Burr. 2223.

If, therefore, in this case, the agreement between the defendant and the public agent actually was that he should be paid for feeding the public horses on as low terms as any other person on the road would supply them, it could not justify detaining the horses; for the particular agreement thus made, under which the food was

*It has been decided (1 Peters, 390.) that the act of congress ought not to be so construed as to shield the carrier of the mail against a temporary stoppage of the mail, by a municipal officer, where it is driving through a populous city at such a rate as to endanger the safety of the inhabitants, contrary to an ordinance of the city. And that if the officer had a warrant against a fellow who had placed himself in the stage, or the driver should commit murder in the street, in the presence of the officer, and then place himself on the box, they would not be protected against arrest because a temporary stoppage of the mail would be the consequence.

furnished, is the foundation of the remedy of the defendant, and it can be pursued in no other manner than upon that agreement. Or, if there was no particular agreement, the case is such, that between the defendant and a private owner of horses and carriages employed in transporting the mail, I incline to think it could not legally be presumed a lien was ever intended or contemplated. A carrier of the mail is bound not to delay its delivery, under severe penalties, and it can scarcely be supposed that he would expose himself to the penalty for such delay by leaving his horses subject to the arrest of every innkeeper on the road for their food, or that in such case the innkeeper could look to any other security than the personal credit of the owner of the horses for reimbursement. But the law on such a case could be only declared on facts admitted by the parties, or found by the jury, and is not now before the court.

3d. The great question in this case rests on discrimination between the property of the government and individuals.

To the government is granted by the constitution the general power to lay and collect taxes, duties, imposts, and excise, to pay the debts and provide for the common defence and general welfare of the *United States*.

To raise and support armies :

To provide and maintain a navy :

To establish post offices and post roads :

And to make all laws which shall be necessary and proper for carrying these and all other constitutional powers into effect.

The public money can never be drawn out of the treasury, unless with the consent of the legislature ; but whenever a debt is contracted in the establishment of a post-

BALTI-
MORE.

U. States

v.

Barney.

BALTI-
MORE.U. States
v.
Barney.

These examples are as strong as any which are likely to occur, but even these are not excepted by the statute, and probably considerations of the extreme importance to the government and individuals of the regular transmission of public despatches and private communications may have excluded these exceptions. But whatever may have been the policy which led to the adoption of the law, which the court will not inquire into, it totally prohibits any obstruction to the passage of the mail. It is the duty of the court to expound and execute the law, and therefore I am of opinion, and decide that the defendant is not justified.

KING'S COUNTY (N. Y.) SESSIONS.

APRIL TERM, 1824.

The People
v.
George Thurston. } NUISANCE.

Clark, Esq., District Attorney, Counsel for the people.

Greenwood and *Dikeman*, Esqs., Counsel for the Defendant.

This was an indictment for keeping a disorderly house and tavern.

It appeared the prisoner and one Allen kept the tavern in partnership; had a sign, with their joint names over the door, and that they dissolved partnership in May, 1823; that previous to the dissolution, playing with cards and dice had been allowed in the tavern, and dances had been held there until a late hour at night.

Mr. Greenwood, counsel for the defendant, moved the

court to direct an acquittal, on the ground that the indictment was not sustained. The indictment charged the defendant with keeping and maintaining a disorderly inn or tavern, and by the evidence, it appeared, that it was kept by Thurston and Allen, who were copartners.

KING'S
COUNTY,
April, 1824.

The People
v.
Thurston.

He contended, that where the offence consisted of an act of which the defendants might be guilty, jointly and severally, as where several were engaged in an assault, or in a felony, there it was proper to indict separately, but where it consisted necessarily of a joint act as here, where both had been engaged in keeping the tavern, then they should be joined: they might plead severally, &c.

Dikeman on the same side.

Mr. *Clark*, District Attorney, in reply, said, there could be no partnership in crime. Defendants are liable severally, unless in cases where it necessarily takes more than one to commit the offence. The jury can judge of the degree of criminality attached to the parties charged.

Lefferts, J. expressed his opinion that the indictment would lie, and that they might be severally charged. And, therefore, the indictment charging the prisoner with keeping a disorderly house, was sustained, by proving it was kept by him and another.

Note.—The defendant might have been indicted jointly or severally, at the option of the prosecutor. Where a number of defendants are charged in one indictment with keeping a disorderly house, the word severally must be introduced in the indictment, or it will be defective. 2 Hale, 174. Chitty's C. L. vol. 1. p. 228. Each individual is, in all cases, responsible only for his own criminal actions or omissions, the result whether the defendant be indicted alone or with others, will be

KING'S
COUNTY,
April, 1824.

~
The People
v.
Thurston.

similar, and no inconvenience can arise to the defendants from being jointly indicted; for if on the trial, the evidence affects them differently, the judge, in his discretion, will select such parts of it as are applicable to each, and leave their cases separately to the jury, in order that each individual may have an impartial trial, unprejudiced by the case of his associates. *Ibid.* 3 T. R. 106. 8 East, 46.

Where the act is such as several may join in, all the offenders may be and generally are joined in the same indictment. Thus, though torts are in their nature several, and each must answer for his own individual crime; yet where several keep a common gaming or other disorderly house, or are guilty of deer stealing, maintenance, extortion, or other offences, which admit of the agency of several, they may be either jointly or severally indicted. 2 Hale, 173. 10 Mod. 335, 6. 1 Vent. 302. 1 Salk. 382. Chitty's C. L. vol. I. p. 220. But several cannot be joined in perjury. 3 T. R. 103. 2 Stra. 921. 2 Burr. 983. Nor on a charge of being common scolds or barrators. 2 Stra. 921.

CIRCUIT COURT, U. S.

MASS. DISTRICT, BOSTON, JUNE 22, 1816.

United States
v.
William Bainbridge. } HABEAS CORPUS.

Present—Hon. *Joseph Story, J.*

THIS was a habeas corpus to Commodore Bainbridge, to bring up the body of Robert Treadwell, an infant of the age of twenty years and about eleven months. By the return of the habeas corpus, and the other proceedings, it appeared that he was born at Ipswich, on the 2d day of August, A. D. 1795: that in the month of May, 1815, he enlisted into the navy of the United States, to serve two years; that soon after his enlistment he deserted from the service, and having been apprehended, was, on the 19th day of June, last past, brought to trial on the charge of desertion, before a regular court martial, and having pleaded guilty to the charge, was, by the sentence of the court, among other things, ordered to serve in the navy of the United States, the term of two years from the said nineteenth day of June, and to forfeit all the wages then due to him. He has a father who is still living, and now absent at sea; and previous to his departure sued out a habeas corpus for the liberation of his son; but it failed, from the return of the officer to whom it

The father's right to his children, whether it results from the guardianship by nature or nurture, cannot now be brought into controversy. This right may be restrained or taken away when abused. The custody of the infant is for his benefit, and not for the parent's. The rights of the parent and infant depend upon the municipal rules of the state. It seems he cannot be compelled to enlist as a common soldier in the army, or a seaman in the navy for the benefit of the parent. The power to enlist minors, in the naval service is included within the power delegated to congress by the constitution, and they may, constitutionally, authorize the enlistment of minors against the consent of their parents. The enlistment of minors in the navy in pursuance of the laws of the United States is a personal contract, made by the infants themselves, for their benefit, and is therefore binding upon them.

BOSTON,
June, 1816.

U. States
v.
Bainbridge.

whom it was directed, that the infant was not in his custody. It was alleged in the affidavits and petition that the enlistment was without the consent of his father.

The cause was argued by *Simmons*, in behalf of the petitioner, and *Aylwin* in behalf of Commodore Bainbridge.

Story, J. The first question is, whether the contract of enlistment, supposing it to have been made without the consent of the father, is valid, or not. By the common law, the father has a right to the custody of his children during their infancy. In whatever principle this right is founded, whether it result from the very nature of the paternal duties, or from that authority which devolves upon him by reason of the guardianship, by nature or nurture, technically speaking, its existence cannot now be brought into controversy. *Ex parte Hopkins*, 3 P. W. 151. Co. Litt. 88., and *Hargrave's notes. Rex v. De Manneville*, 10 Ves. jun. 52. 1 Bl. Com. 452. 461. This right, however, is not unlimited; for whenever it is abused by improper conduct on the part of the parent, courts of law will restrain him in its exercise, and even take the custody permanently from him. *Archer's case*, 1 Lord Raym. 673. *Rex v. Smith*, 2 Stra. 982. *Rex v. Delaval*, 3 Burr. 1434. *Commonwealth v. Addicks*, 5 Bin. 520. By the common law, also, a father is entitled to the benefits of his children's labour, while they live with him, and are maintained by him; but this, (as has been justly observed,) is no more than he is entitled to from his servants. 1 Blac. Com. 453. It has also been asserted, that, by the same law, a father may bind his children as apprentices without their consent, and thereby conveying the permanent custody of their persons, as well as benefit of their labour, to their

masters, during their minority. Com. Dig. "Justices of the Peace," p. 55. But notwithstanding the aid of very respectable authorities, (*Day v. Everett*, 7 Mass. Rep. 145. *Matter of Mc Dowles*, 8 Johns. Rep. 328.) it may well be doubted if this doctrine can be supported to the extent in which it is laid down. The custody of minors is given to their parents for their maintenance, protection and education; and if a parent, overlooking all those objects, should, to answer his own mercenary view, or gratify his own unworthy passions, bind his child as an apprentice upon terms evidently injurious to his interest, or to a trade or occupation which should degrade him from the rank and character which his condition and circumstances might entitle him, it would be extremely difficult to support the legality of such a contract. See *Rex v. Kepple*, 2 Dall. 197. *The King v. The Inhabitants of Cromford*, 8 East. Rep. 25. And it would be a strong proposition to maintain, that a father might, in a time of war, upon the mere footing of the common law, enlist his son as a common soldier in the army or as a common seaman in the navy, without his consent, and compel him to serve, during the whole period of his minority, without a right to receive to his own use any of the earnings of his laborious and perilous course of life. In such a contract there would not be even a semblance of benefit to the minor. It is not, however, necessary to decide these points; and they are commented on merely in answer to some suggestions at the bar. Be the rights of parents, in relation to the custody, and the services of their children, whatever they may, they are rights depending upon mere municipal rules of the state, and may be enlarged, restrained, and limited, as the wisdom or policy of the times may dictate, unless the legis-

BOSTON,
June, 1816.

U. States
v.
Bainbridge.

BOSTON,
June, 1815.

United States
v.
Bainbridge.

lative power be controlled by some constitutional prohibition.

The constitution of the United States has delegated to congress the power to "raise and support armies," and "to provide and support a navy," and independent of the express clause of the constitution, this must include the express power *to make all laws which shall be necessary and proper for carrying into effect the foregoing power.* It is certain that the services of minors may be extremely useful and important to the country, both in the army and navy. How many of our brilliant victories have been won by persons, on land and at sea, who had scarcely reached the age of manhood? In the navy; in particular, the employment of minors is almost indispensable. Nautical skill cannot be acquired but by constant discipline and practice for years in the sea service; and unless this be attained in the ardour and flexibility of youth, it is rarely at a later period the distinguishing characteristics of a seaman. It is notorious, that the officers of the navy generally enter the service as midshipmen as early as the age of puberty; and that they can never receive promotion to a higher rank, until they have learned, by a long continuance in this station, the duties and labors of naval warfare; and to this early discipline and experience, as much as their gallantry and enterprise, we may proudly attribute their superiority in the contests on the ocean during the late war. It cannot therefore be doubted, that the power to enlist minors into the naval service, is included within the power delegated to congress by the constitution, and that the exercise of the power is justified by the soundest principles of national policy. And if this exercise should sometimes touch upon supposed private rights or private convenience, it is

to be enumerated among the sacrifices which the very order of society exacts from its members in the furtherance of the public welfare.

ROSTON,
June, 1816.

United States
v.
Bainbridge.

The position asserted at the bar, denying congress the power of enlisting minors without the consent of their parents, is not a little extraordinary. It assumes as its basis, that a granted power cannot be exercised in derogation of the principles of the common law; a construction of the constitution which would materially impair its vital powers, and overthrow the best settled rules of interpretation. Can there be a doubt that the state legislature can, by a new statute, declare a minor to be of full age, and capable of acting for himself at fourteen instead of twenty-one years of age? Can it not emancipate the child altogether from the control of its parents? It has already in the case of paupers, taken the custody of the parents, and enabled the overseers of the poor to bind out the children as apprentices or servants during their minority without consulting the wishes of their parents. Act 26th Feb. 1794, sec. 4. It has, without the consent of the parents, obliged minors to be enrolled in the militia, and to perform military duties; and although these duties are in time of peace but a slight interference with the supposed right of parents, yet they may in time of war expose the minors to the constant perils and labours of regular soldiers, and altogether deprive their parents of any control over their persons or services. In time of war, too, the state may, for its defence, establish and maintain an army and navy; and it would be a strange and startling doctrine, that the whole youth of the state might, unless the consent of their parents could be previously obtained, be withheld from the public service, whatever might be the pressure of the public dangers or

BOSTON,
June, 1816.

United States
v.
Bainbridge.

necessities. And if the state legislature could, in their discretion, abrogate or limit the paternal authority, it might be for precisely the same reasons that the national legislature could do it; in that it was necessary or proper to carry into effect some other granted powers. It has been very justly observed, in a work of the very best authority, (*The Federalist*, No. 44,) that no maxim is more clearly established in law or in reason, than that whenever the *end* is required, the *means* are authorized; whenever a general power to do a thing is given, every particular power necessary for doing it is included. And I feel no scruple in affirming, that congress having authority to provide and maintain a navy, may constitutionally authorize the enlistment into the naval service of any minors, independent of the private consent of their parents: and the statutes passed for this purpose will be emphatical by the supreme law of the land. Nor is the exercise of this power novel in the institutions of that country from which we have borrowed most of the principles which regulate our civil and political rights. It has been pushed to an extent, which is not only odious, but has become in a great degree subversive of the personal liberty of a large class of meritorious subjects. Minors may not only be enlisted into the British navy, without the consent of their parents, but may be forcibly impressed into it, against the joint consent of their parents and themselves. And even apprentices, regularly bound by contract, are not, except in special cases, and for a limited time, prescribed by statute, exempted from the like impressment. *The King v. Reynolds*, 7 Term Rep. 479. *The King v. Edwards*, 7 Term Rep. 745. *Ex parte Softly*, 1 East. Rep. 466. *Ex parte Brocke*, 6 East. Rep. 238. Stat. 13 Geo. 2. chap. 13.

Much has been stated in the argument in reference to what contracts infants are void, and what are voidable at common law. There is, in the books, considerable confusion on this subject, which has not been entirely removed by the learned discussions in *Zouch v. Parsons*, 3. Burr. 1794. The distinctions laid down in another case by Lord Chief Justice Eyre, seemed founded in solid reason, viz. that when the court can pronounce, that the contract is for the benefit of the infant, as for instance, for necessaries, then it shall bind him, when it can pronounce it to their prejudice, it is void; and that where it is of an uncertain nature, as a benefit or prejudice, it is voidable only, and it is in the election of the infant to affirm it or not, *Kean v. Boycott*, 2 Hen. Blac. 511. It is a material consideration also, that the validity of the infant's act or contract is, in point of law, independent of the right of custody in his parent, although it may be an ingredient in ascertaining in point of fact, whether the act for contract be for his benefit or not. In short, the disabilities of an infant are intended by law for his protection, and not for the protection of the rights of third persons, and his acts may, therefore, in many cases, be binding upon him, although the persons under whose guardianship, natural or positive, he then is, do not assent to them. The privilege, too, of avoiding his acts or contracts when they are voidable, is a privilege personal to the infant, and which no one can exercise for him. *Kean v. Boycott*, 2 Hen. Blac. 511. And whenever any disability created by the common law, is removed by the enactment of a statute, the competency of the infant to do all acts within the purview of such statute is as complete as that of a person of full age. And whenever a statute has authorized a contract for the public service, which

BOSTON,
June, 1816.

United States
v.
Bainbridge.

BOSTON,
June, 1816.

United States
v.
Bainbridge.

from its nature or objects is manifestly intended to be performed by infants, such a contract must, in point of law, be deemed to be for their benefit; so that when *bona fide* made, it is neither void nor voidable, but is strictly obligatory upon them. I say *bona fide* made, for if there be fraud, circumvention or undue advantage taken of the infant's age or situation by the public agents, the contract would not, in reason or justice, be enforced. It would be strange, indeed, if courts of law could judicially hold contracts to be void or voidable which the legislature should deem salutary, or essential to the public interest, or pronounce them invalid, because entered into by the very parties who were within the contemplation of the law.

From these more general considerations, we may now pass to the question, whether the laws of the United States authorise the enlistment of minors, without the consent of their fathers. All the acts, from the first establishment of the navy, authorize the employment of midshipmen, who are invariably minors when they enter the service: and all the acts since the statute of 30th of June, 1778, ch. 81. including those now in force, under which the present applicant has been enlisted and held in service, in express terms authorize the President to engage and employ "boys," in the ordinary duties of the navy. In no one of them is there any provision requiring the consent of parents or guardians, to their engagements, or authorizing them to make it. (See the act 30th June, 1798, chapter 81.; of 24th April, 1806, ch. 36.; of 3d March, 1807, ch. 35.; of 31st January, 1809, ch. 78.; and of the 2d January, 1813, chapter 148.) The laws manifestly contemplate that it is a personal contract, made by the infants themselves for their own benefit. They are entitled to the pay, the bounties

and the prize money, earned and acquired in the service. This is not denied in the argument; and if the laws be so, then they must, by necessary implication, give a capacity to infants to make such a contract, and, when made, to assert its legal validity. Upon any other supposition, the whole objects of the legislature would be defeated. For if the contract of the infant, made without the assent of his parent, were void or voidable, that assent could not, by the mere operations of the common law, change its character. A contract, voidable by the common law, cannot be confirmed or avoided by any assent or dissent of the parent thereto. It is binding or not, solely by the election of the infant himself; and if the contract be void, it is incapable of being set up by any person to suppose that the legislature meant to authorize an infant to enlist in the navy, and yet that contract should be voidable at his election, would be to suppose that it meant to repeal the rules and articles of the navy in his favor; and enable him to desert, when his services were most important to the public.

BOSTON,
June, 1816.

United States
v.
Bainbridge.

If, indeed, the acts of congress had authorized parents or guardians to bind their minor children to an apprenticeship, or servitude in the navy, a valid contract might then have been made by such parents or guardians. But there is no such authority in the acts; nor am I satisfied that it ever existed at the common law; and if it ever did, the statute of Massachusetts, of the 29th of February, 1795, chapter 64, seems to have restrained the exercise of that power, to the cases and the manner specified in that statute. A different doctrine has, indeed, been held, but it seems to me extremely difficult to be maintained. *Day v. Everit*, 7 Mass. Rep. 145. And in a

BOSTON,
June, 1816.

United States
v.
Bainbridge.

case depending upon similar principles of construction, the opposite doctrine has been established in another court.

Ex parte, McDowle, 8 Johns' Rep. 253.

Upon the whole, as congress have authorized "boys" to be engaged in the service of the navy, without requiring the previous consent of their parents to the contract of enlistment, that contract, when fairly made, with an infant of reasonable discretion, must be deemed to have a semblance of benefit to him, to be essential to the public welfare, and therefore binding to all intents and purposes; and if it were not so binding, but were avoidable, even the consent of parents could not infuse into it any farther validity. This construction of the acts respecting the naval establishment, is confirmed by the general practice in that department; and by the consideration, that in the acts respecting enlistments in the army, a proviso was, for a long time, inserted, "that no person under the age of 21 years, should be enlisted by any officer, or held in the service of the United States, without the consent of his parents, guardian or master, first had and obtained, *if any he have*. See the act of 16th of March, 1802, ch. 9.; of 11th January, 1813, chap. 154. And at length, the necessities of the public service were such, that the enlistment of minors over eighteen years of age into the regular army, was expressly authorized; and the proviso of the act of the 30th of January, 1813, ch. 154., which required the previous consent of their parents, guardians, or masters, was expressly repealed by the act of the 10th of December, 1814, chapter 10. This course of legislation manifestly shows, that, whenever the rights of parents were intended to be saved, a special proviso was uniformly introduced for that pur-

pose. The decisions of two very respectable state courts, which have been cited at the bar, so far as they go, proceed on the same principles, which have been adopted by this court, and are entitled to great weight. *Commonwealth v. Murray*, 4 Bin. 487. *Ex parte, Emanuel Roberts*, 2 Hall's Law Journal, 192. The decisions of our own state court, which have been cited on the other side, are inapplicable, for they turn altogether upon the meaning and extent of the proviso, in the army act of 1813, ch. 154. It is not now necessary to consider how far a state court has jurisdiction to discharge a person, who, by the return of the habeas corpus, is shown to be enlisted under a contract with the United States. Whenever that question shall arise, it will deserve very grave consideration. See *Ex parte Roberts*, 2 Hall's Law Journal 192.; *Ferguson's case*, 9 Johns' Rep. 239. But with great deference to the learned judges, I have never been able to bring my mind to assent to the construction put upon the act of 1813, in some of the cases in the Mass. Rep. *Commonwealth v. Cushing*, 11 Mass. Rep.

BOSTON,
June, 1816.

United States
v.
Bainbridge.

The view which has been taken, upon the general question, as to the validity of the contract of enlistment, renders it necessary to consider the second point made in this case, viz. how far an infant can, by disaffirming his contract of service, avoid the punishment which has been regularly adjudged against him by the sentence of a court martial, for a crime committed against him: the whole proceeding and sentence having been pronounced while the contract was in force. If it had become necessary in this case to ascertain whether there had been any consent of the father, I should have thought it necessary to have required more explicit affidavits than have

BOSTON,
June, 1816.

United States

v.
Bainbridge.

been made, and a peremptory denial of assent on the part of the father, as well as a special statement of facts, as to the mode of life and place of residence, of the minor, previous to the enlistment. For an assent of the father need not be expressed, but may be implied from circumstances.

If a father should voluntarily send his minor children away from home, to obtain a maintenance, or support in any manner that they could, this would be an implied consent to any contract, for that purpose, into which they should enter, and a waiver of his parental rights. It is upon this ground, that the ordinary retainer of servants who are minors, are held valid, against the subsequent acts of the father. In strictness of law, the contract of the minor, in such cases, becomes obligatory, because, being exiled from his father's house, whatever contract he forms, is, in an enlarged sense, necessary for his support, maintenance, and education. I am of opinion, that Robert Treadwell, the minor, ought to be remanded to the custody of his commanding officer.

It was the opinion of the district judge, (Davis,) that the consent of the parent or guardian, where there is one, is necessary, either express or implied, to authorize the engagement of a minor in the naval service; but he concurred in the order, to remand the said Robert to the custody of his commanding officer, on the special circumstances of the case.

SUPREME COURT.

PHILADELPHIA, 1807.

The Commonwealth
v.
William Duane.

HABEAS CORPUS.

Tilghman, C. J. This case comes before me in consequence of a habeas corpus, directed to the gaoler of the city and county of Philadelphia, commanding him to bring before me the body of William Duane, together with the cause of his being imprisoned. The gaoler, in obedience to the writ, has produced the body of William Duane, and returned that he was detained in prison by virtue of a warrant of commitment from the Mayor of Philadelphia. This warrant recites, that William Duane had been charged, on the complaint of the Marquis de Casa Yrujo, made through the Attorney General, and on the oath of William B. Hight, with having, on the 19th and 21st of July last, in a public newspaper, called the *Aurora* or *General Advertiser*, edited by the said William Duane, published certain libels on the said Marquis, and the said William Duane had been required by the said Mayor, to enter into a recognizance, as well for his appearance at the next Mayor's court, as for his good behavior in the mean time, which he had refused to do; and contains a commitment of William Duane until he shall enter into a recognizance as aforesaid, or be delivered by due course of law.

From an examination that has been laid before me, it also appears that the said William Duane offered before the mayor, to enter into a recognizance for his appearance, but refused to enter into one for his good behavior. So

A party charged with the publication of a libel may be bound in a recognizance for his appearance, &c., but not for his good behavior.

There may be cases, however, in which it may be necessary to insist upon surety for good behavior; but as a general rule, it should not be demanded before conviction.

The words in the stat. 34 Edw. 3., "persons not of good fame," do not seem to include persons charged with the publication of libels.

The inconveniences that would follow demanding surety for good behavior before conviction.

Difference between recognizance to keep the peace and surety for good behavior.

PHIL'A.
1807.

Com'wealth
v.
Duane.

that the only question for my determination is, whether it is proper to insist on the recognizance for the good behavior of William Duane, between this time and the next Mayor's court.

In the consideration of this point are involved principles of importance, which have agitated the feelings and divided the judgments of many persons both in this and other states of the union.

I have considered it, certainly without passion or prejudice, and with as much attention as the short time allowed for decision would admit.

Surety for good behavior may be considered in two points of view: It is either required after conviction of some indictable offence; in which case it forms part of the judgment of the court and is founded on a power incident to courts of record, by the common law; or it is demanded by judges, or justices of the peace, out of court, before the trial of the person charged with an offence, in pursuance of authority derived from a statute made in the 34th year of Edward III. It is this last kind which we are now to consider. The statute 34 Ed. III. authorizes justices of the peace to take surety for good behavior, of all those that are *not of good fame*, to the intent, that the public may not be troubled by such persons. It is supposed that this statute was made to prevent the disorders which were introduced by the soldiers of Edward III.; numbers of whom, after serving in his armies in France, were discharged in England. The natural meaning of the words "persons not of good fame," seems to be those who by their general evil course and habits of life, had acquired a bad reputation, and were supposed to be dangerous to the community. In process of time, however, the construction of these ex-

pressions has been extended far beyond their original meaning ; and persons are now commonly held to find surety for their good behaviour, who are not generally of ill fame but have only been charged with some particular offence. It is laid down by some ancient authors, that libellers may be held to surety for good behaviour. But on searching the English books of reports, I find but few cases in which courts have given their opinion on this point. The decisions of the English courts, prior to our revolution, are, with some few exceptions, received as authority in our courts. Now, it appears from the cases before the revolution, that it was by no means an established practice, that a man charged with a libel, should before conviction, be held to surety for his good behaviour. In the case of the King v. Shuckburg, in the year 1743, reported 1 Wils. 29., the defendant was arrested by virtue of a warrant from the secretary of state for publishing a blasphemous libel called Old England's Te Deum. Upon being brought up to the court of King's Bench, by habeas corpus, in order to be bailed, he offered to enter into the common recognizance for his appearance. The Attorney General insisted on bail for his good behaviour also. The Lord Chief Justice said, it has often been taken both ways, and he intended to take the opinion of all the judges ; he therefore, for the present, took the defendant's recognizance for his appearance only, and made him enter into a rule to put in bail for his good behaviour, if the major part of the judges should be of the opinion that he ought. Nothing farther appears to have been done in this case : in a marginal note of the report of it by Sergeant Wilson is mentioned the case of the King against Franklin, 5 Geo. II. When the same point was argued before all the judges,

PHIL'A,
1807.

Com'wealth
v.
Duane.

PHILLA,
1807.
Com'wealth
v.
Duane.

but they never gave any opinion. Mr. Highmore, in his Treatise on Bail, published in the year 1783, cites the case of the King v. Shuckburg, and seems to consider the law as still unsettled. It appears from these authorities, that the English judges were unwilling to establish a practice which they might have thought hostile to the genius and spirit of the nation.

Let us now examine how this matter has been considered in America. The United States, in general, have at all times been very much alive to the liberty of the press and the right of trial by jury; and their constitutions have shown great jealousy and sensibility on these points. In prosecutions for libels against the king and officers of government, it has been usual, in England, to prosecute by way of information; a mode of proceeding, by which the defendant is brought to his trial by a petty jury at the instance of the Attorney General, without the previous inquiry by the grand jury. The constitution of Pennsylvania has taken special care to guard against this. Grand juries are not to be dispensed with, except in certain enumerated cases, of which libel is not one. It also provides, that every citizen may freely speak, write and print, on every subject; being responsible for the abuse of that liberty. I think that the counsel for Mr. Duane, has gone too far, in contending that our constitution absolutely prohibits the binding a man to his good behaviour for a libel before conviction. It only provides, that a man may freely speak, write and print, at his own peril, being responsible either to the public, or any individual whom he may injure. It is generally understood, and I think truly, that this provision was intended to prevent men's writings from being subject to the

vious examination and control of an officer appointed by the government, as is the practice in many parts of Europe, and was once the practice in England; now, a man, though bound to his good behaviour, may still publish what he pleases, and if he publish nothing unlawful, his recognizance will not be forfeited. Indeed, I consider this point as having been decided by the Supreme Court, and ultimately by the High Court of Errors and Appeals, in the case of the Commonwealth v. Cobbett, which I shall consider more particularly presently. But, although it has been decided, that a recognizance, when thus taken, is not void, yet it never has been decided within my knowledge, that it is incumbent on a judge, or that it is prudent or proper, to call for surety of good behaviour from a person charged with a libel, before trial; and that is the point now before me. Indeed, from the charge delivered by Chief Justice Shippen, in Cobbett's case, of which my brother judge, Smith, has favoured me with a very accurate note, I should not suppose that the chief justice, or either of the other judges, would have thought it proper to call for this kind of surety, except under very extraordinary circumstances. The case now before me is attended with no every peculiar circumstance, so far as it has come to my knowledge judicially, and I must confine myself to the evidence produced. The mayor, who was so very obliging as to favour me with an account of what passed at his office, declared that he considered the security for good behaviour as a thing quite of course, and for that reason only, would not dispense with it. And he also declared, that he prepared the recognizance himself, in what he conceived the usual form, without the instruction or direction of the attorney general. Now, if this

PHIL'A,
1807.

Com'wealth
v.
Duane.

PHIL'A,
1807.
Com'wealth
v.
Duane.

practice be established, two consequences will follow which certainly may be attended with great inconvenience. In the first place, the justice who takes the recognizance, may fix it in whatever sum he pleases; and then if it should be forfeited by a libel of the mildest nature, the whole penalty must be recovered, without any power in the court to mitigate the punishment according to the nature of the offence. And, in the second place, the defendant may be brought to trial for a libel, so far as to be burdened with the forfeiture of his recognizance, without the previous investigation of a grand jury. No considerate man will say, that, under certain circumstances, these may not be very great evils. No man can exactly calculate how far a practice of this kind, exercised by daring and wicked hands, into which it may sometimes fall, may stifle or even extinguish the spirit of honest investigation and necessary inquiry. And what is the reason for it? The party complaining has a right to the protection of the laws, and will receive it. The person accused will be brought to his trial, and if convicted, he will be punished according to the degree of the offence. What more does public justice require? But it is said, it is necessary to prevent future libels; if future libels are published while the prosecution is depending, they will be punished on conviction, in proportion to the obstinacy of the offender. No man abhors, more than I do, the base practice of libelling. It is a crime forbidden by the laws of God and man, and of much blacker dye than some men seem to be aware of. All classes and descriptions of men, all parties have lamented and suffered by the uncontrolled licentiousness of the press. I am not without hopes that the evil will be lessened; that a remedy may be found, in the

honesty and good sense of a majority of the people, aided by the wholesome chastisement which courts and juries will be called on from time to time to inflict. But in order to give those punishments their full efficacy in the community, it will be necessary, in judicial proceedings, to temper firmness with liberality, never forgetting that human principle which, in doubtful cases, turns the scale in favour of the accused. I should have felt little difficulty in deciding the question before me, but for the case of Wm. Cobbett, cited by the attorney general in his argument. Mr. Cobbett was, in the year 1797, bound, with two sureties, in a recognizance for his good behaviour, by the chief justice and the present governor, Mr. Kean, whose opinion has great weight with us, because I consider him an eminent lawyer, zealously attached to the liberties of this country, both civil and religious. I have not been able to obtain an accurate statement of the case of Cobbett, so far as it relates to the binding of him to his good behaviour. Judge Smith's notes only contain an account of the action on the recognizance tried in the Supreme Court. As far, however, as I have heard, it differs from the present case in some material circumstances. I have never seen the warrant against Cobbett; but I have been informed, that he was charged in it with numerous libels against different persons, of which, on his appearance before the chief justice, he avowed himself the author. In the present case, Duane is charged with publishing two libels against the same person, and he has not confessed that he is the author of either. As a judge, I know nothing that is not legally proved before me. I must not act on the supposition that the defendant has published numerous libels, because there is no oath to

PHIL'A,
1807.

Com'wealth
v.
Duane.

PHIL'A,
1807.
Com'wealth
v.
Duane.

that purpose; and, by our constitution, all warrants must be grounded upon an oath or affirmation. Upon the whole, the most that can be said, with regard to the recognizances for good behaviour, is, that they are demandable or not, at the discretion of the judge. They differ from recognizances to keep the peace, in two important features: 1st. Surety for good behaviour is more extensive in its nature than surety for the peace, and may be more easily forfeited, and, therefore, should be exacted with greater caution. 2d. Surety of the peace is demandable of right by any individual who thinks himself in danger of bodily hurt, and will make the necessary oaths; but this principle has not been applied to surety for good behaviour. I will not say that there are no circumstances in which surety for good behaviour ought to be exacted in cases of libels before conviction; on the contrary, I have no doubt but there are occasions on which it may be proper and necessary to insist upon it. But I am of opinion that it will be most agreeable to the spirit of our constitution, and most conducive to the suppression of libels, to adopt it as a general rule, not to demand surety for good behaviour before conviction. Under these impressions, I must discharge the defendant on his entering into recognizance for his appearance at the next Mayor's Court.

ALBANY, (N. Y.) 1814.

In the Matter of }
Amasa Roode. } HABEAS CORPUS.

J. V. N. Yates, Recorder. The prisoner claims to be discharged under the 23d section of the act of Congress of March 16th, 1812, which enacts, "that no non-commissioned officer, musician, or private, shall be arrested, or subject to arrest, or be taken in execution for any debt *under* the sum of twenty dollars contracted *before* enlistment, nor for *any* debt contracted after enlistment."

Construction of the act of congress, in relation to the arrest of an enlisted soldier in the U. S. army, March 16th, 1812.

It appears that the prisoner is confined in the prison of Albany county, on mesne process, issuing out of the said county, at the suit of John Shepard, for a debt of twenty-eight dollars and fifty cents. The facts in this case, as disclosed on the return of the habeas corpus being made to me, (of which the plaintiff by my order had previous written *notice*, and attended accordingly,) appear to be as follows :

The prisoner is a private, duly enlisted in the United States army. Before his enlistment; he was indebted to three several persons in small sums, neither of which amounted to twenty dollars, but which in the aggregate exceeded that sum. After his enlistment, the prisoner was induced to give his note to each of those three persons, for the sums he respectively owed them, which notes came to the plaintiff's (Shepard's) hands by purchase or assignment, and being negotiable, the plaintiff

ALBANY, consolidated them in one suit, and in this suit the prisoner is at present in custody.

In the Matter
of
Amasa Roode.

Technically speaking, the cause of action in this case accrued to Shepard after the enlistment; and if the debt is to be assimilated to the cause of action, then no doubt can remain that this demand was contracted after enlistment; certainly before the enlistment Shepard was not a creditor: his right as endorser arose subsequently, and the very form of declaring by endorser against drawer, alleges a promise or assumption (the basis of the action) by the defendant to the plaintiff, after the notes were assigned or endorsed. Hence, upon a strict application of legal principles, the relation of debtor and creditor did not exist between the parties until after enlistment.

In this case, I am inclined to adopt these principles: By it, full effect is given to the act of congress, which ought to receive a favourable construction, as being made for the support and defence of the country; this, too, will prevent a volunteer creditor from interposing his claims between the government and its military forces, and will prevent fraudulent or colourable purchase of debts being made, with a view either to harass the soldier, or diminish the national strength.

I am clearly of opinion, therefore, that the prisoner, under the particular circumstances of this case, comes within the operation of the act of congress, and must be discharged from imprisonment.

The prisoner was accordingly discharged from prison, and delivered over to his commanding officer.

CIRCUIT COURT U. S.

RICHMOND, DECEMBER, 1817.

United States
v.
William Hutchings. } PIRACY.

Present—Hon. Ch. J. *Marshall.*

William Wirt, Esq., Counsel for the United States.

Messrs. Upsher and Murdaugh, Counsel for the prisoner.

The leading facts proved on the part of the prosecution, were the following :

The schooner *Romp*, armed with six eighteen pound carronades, sailed from Baltimore early in April last, ostensibly on a commercial voyage for Buenos Ayres. She took with her an American register, and was, in all respects, documented as an American vessel. About 12 days after leaving the capes of Virginia, her crew were mustered, when they were informed of the destination of the vessel against the commerce of Spain. A salute was fired ; the colours of Buenos Ayres hoisted ; the name of the vessel changed from the *Romp* to the *Santafecino*, and articles under the government of Buenos Ayres signed by the crew.

There was some disagreement between the witnesses as to the manner in which the crew received the intelligence of this change in the national character of the vessel, some affirming that the colours of Buenos Ayres were saluted with cheers, and affirming that they were saluted with murmurs.

On an indictment for piracy, a commission from a government, whose independence has not been recognized may be given in evidence to the jury merely as a paper found on board the vessel ; it cannot be received to justify piratical acts committed under it.

The seal of one government not recognized by the other proves nothing. A nation becomes independent from its declaration as it respects its own government ; and independent as to other nations when recognized by them.

To make a robbery upon the high seas piracy, it is not necessary that robbery should be punished by death upon land.

RICHMOND
December.

United States

v.
Hutchins.

The *Santafecino*, however, proceeded on her cruise, and in the course of it, captured five Spanish vessels, out of which they took every thing valuable, sent two of them to Buenos Ayres for condemnation, and gave up the rest to the prisoners. Near an hundred vessels, American, Portuguese, Dutch, English, and others, which were neutral between Buenos Ayres and Spain, were spoken during the cruise; all of which were treated politely. The general conduct of the *Santafecino*, appeared to be that of a regular commissioned vessel, her prisoners being treated humanely, and their private property restored to them, and perfect respect always paid to the vessels of neutral nations. Some of the witnesses, who were of the crew of the *Santafecino*, farther proved that the crew were dissatisfied with the colours under which they sailed, and that the revolt among them was in consequence of this dissatisfaction.

The only evidence offered on the part of the prisoner was a paper, purporting to be a commission to the *Santafecino*, and a commission to the prisoner, as sailing master on board of her, from the government of Buenos Ayres. The district attorney objected to their going to the jury, because,

1st. There was no evidence of their being genuine papers, as there was no proof that Buenos Ayres was an independent government, nor that the seals attached to these commissions was the seal of Buenos Ayres.

2d. If the commissions were genuine papers, they obviously did not belong to this vessel, for they bore date in November, 1815, and the name of *Santafecino* was not borne by this vessel until the April following.

These points Mr. *Wirt* pressed with his usual eloquence and vigor.

Mr. *Usphur*, for the prisoner, contended, that the papers ought to go to the jury, as evidence to be allowed, whatever weight they should be entitled to. He contended that the question, whether Buenos Ayres was independent or not, was for the executive to decide, and not the judiciary. That a late correspondence between Don Onis, the Spanish minister, and the American secretary of state, proved that the people of Buenos Ayres were in a state of revolution, exerting themselves to throw off the yoke of Spain. That there was an exact and perfect analogy between that contest and the revolutionary contest of our country. That by the treaty of 1783, by numerous decisions of our courts, recognizing the validity of laws passed during the revolution, and by express decisions on the point, the principle was settled that our existence as an independent nation commenced with our declaration of independence in 1776, and not with the definite treaty of peace in 1783. That by parity of reasoning, the independence of Buenos Ayres commenced with their declaration of independence, and as that declaration was matter of notoriety throughout the world, and was more particularly proved by the correspondence between Don Onis and Mr. Monroe, we were bound to consider them an independent people. That the seal of an independent people proved itself, and was not the subject of proof by any other sort of evidence. That it was, in its nature the highest species of evidence, because no nation could delegate to subordinate agents a greater power or authority than it possessed itself. That this principle was fully recognized in the supreme court; and it was indeed an offspring of the comity of nations, which all civilized nations acknowledged. That of course the seal attach-

RICHMOND
Dec. 1817.

United States
v.
Hutchings.

RICHMOND
Dec. 1817.

United States
v
Hutchings.

ed to the commissions, in the present instance, proved itself—proved the genuineness and object of the commissions, and that it was incompetent to the prosecution to call for any other evidence as to these points. This argument, Mr. Upshur considered applied to both points made by the district attorney, but even if it did not, that there was nothing in the second point, because these commissions were executed and dated in Buenos Ayres, in blank, and were left to be filled up by the agent of that government in this country. That this was a satisfactory mode of accounting for the difference of time between the date of the commission and the adoption of the name of the *Santafecino*, and that there could be no reason to believe that the commissions had ever been used on board of any other vessel.

The court decided, that the commissions should go to the jury, merely as papers found on board the vessel. But on the main question, the court was of opinion, that a nation became independent from its declaration of independence, only as respects its own government, and the various departments thereof. That before it could be considered independent by the judiciary of foreign nations, it was necessary that its independence should be recognized by the executive authority of those nations. That as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its independence. That, therefore, the court could not acknowledge the right of that country to have a national seal, and of course that the seals attached to the commissions in question, prove nothing.

Upon this state of the testimony, the case was argued before the jury. The cause occupied the whole of Thursday and Friday. In the course of the argument, Mr. Upshur made the point, whether by the act of con-

gress, under which the prisoner was indicted; a robbery on the high seas amounted to piracy in any case. The words of the act are, that "if any person shall, upon the high seas, or in any haven, bay, or river, out of the jurisdiction of any particular state, commit murder, robbery, or any other crime or misdemeanor, which, if committed in the body of a country, would by the laws of the United States be punished with death, it shall amount to piracy." The argument of Mr. Upshur was, that it was necessary that robbery should first be made punishable with death by the laws of the United States, when committed on land, before it could amount to piracy, when committed on the sea, which was not now the case. That judge Johnson had so decided in South Carolina, although a contrary decision had been subsequently pronounced by judge Washington.—That the conflict between these two learned judges, proved that the law was at least doubtful—that the jury in a capital case were judges, as well of the law as the fact, and were bound to acquit, where either was doubtful.

RICHMOND
Dec. 1817.
United States
v.
Hutchings.

The court being appealed to for the interpretation of the law, decided that it was not necessary that robbery should be punishable by death when committed on land, in order to amount to piracy if committed on the ocean; but as two judges, (for both of whom the court entertained the highest respect,) had pronounced opposite decisions upon it, the court could not undertake to say that it was not at least doubtful.

Mr. Murdaugh contended, that the acceptance of these commissions amounted to an act of expatriation. Mr. Wirt, on the other hand, insisted that it was not competent to any one to change his national character by his own act alone, without the concurrent act of the government he adopted.

RICHMOND
Dec. 1817.

United States
v.
Hutchings.

The court indicated an opinion against Mr. Murdaugh, founded chiefly upon the opinion already pronounced, that the government of Buenos Ayres could not be recognized by the court as existing at all. The facts were commented on by all the counsel at considerable length.

The jury retired at candle-light on Friday evening, and in about ten minutes returned a verdict of *Not Guilty*.

GENERAL SESSIONS.

NEW YORK, FEBRUARY, 1819.

<i>The People</i>	}	ASSAULT AND BATTERY.
v.		
<i>James W. Lent.</i>		

Present—Hon. C. D. Colden, Mayor.

Pierre C. Van Wyck, Esq., Counsel for the Prosecution.

Anthon, Counsel for the Defendant.

The General Sessions have jurisdiction over offences committed on Governor's Island, notwithstanding it has been ceded to the U. S., and notwithstanding it has been declared in the act of session (Feb. 15th, 1800, 1 R. L. 189,) the place "shall hereafter be subject to the jurisdiction of the U. S."

A plea to exclude the jurisdiction of that this court would have cognizance of the case, if it the Sessions, must show that the place was purchased by the United States; being subject to their jurisdiction, is not sufficient. It must appear by some act, on the part of the government, that they intend to exercise exclusive jurisdiction.

Some powers of the general government are from their nature exclusive; there are other powers where congress has a right to exclude the state authority, but until they so the jurisdiction of the state is not taken away.

By the Court.—The defendant is indicted for an assault and battery on James Dusenbury, a deputy sheriff, in the execution of his office. To this indictment the defendant has pleaded, that the offence, if any, was committed on Governor's Island, and that this court has not jurisdiction of the offences committed on that Island, the same having been ceded by the state to the United States. To this plea the district attorney has demurred specially, and assigned for cause, that the plea does not show any other court competent to try the case. The defendant has joined in demurrer, and the validity of the plea is now to be decided.

For our present purpose, it must be taken as conceded, that the offence charged in the indictment was committed in a part of the state of New York, which is within the bounds of the city and county of New York, and that this court would have cognizance of the case, if it the Sessions, must show that the place was purchased by the United States; being subject to their jurisdiction, is not sufficient. It must appear by some act, on the part of the government, that they intend to exercise exclusive jurisdiction.

has not been deprived of its jurisdiction as to all crimes committed on Governor's Island, by the constitution and laws of the United States, and by an act of the legislature of this state, passed 15th of February, 1800, (1. R. L. 189.) by which it is enacted, that "all that island called Governor's Island, on which Fort Jay is situated, bounded on all sides by the waters of the East River and Hudson River, shall hereafter be subject to the jurisdiction of the United States." There is a proviso, reserving the right to serve process issuing under the authority of the state; but as a right to serve process, and criminal jurisdiction as to offences, are totally distinct, and the former does not embrace the latter, the proviso may, in this case, be laid entirely out of consideration. But it may be observed, that if this offence should have been committed on the officer, when he was attempting to serve process, the proviso would be absolutely nugatory; so long as congress have not legislated on the subject, this court cannot punish the offender.

NEW YORK
Febr'y, 1819.

~ ~ ~
The People
v.
Lent.

By the constitution of the United States, (art. 1. s. 8.) congress have power to exercise exclusive legislation in all cases whatsoever, over such district as might become the seat of government of the United States, "and to exercise like authority over places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings, and to make all laws which shall be needful and necessary for carrying into execution the foregoing powers."

The plea to exclude the jurisdiction of this court will not be good, unless it shows that Governor's Island was a place purchased by the government of the United States, with the consent of the legislature of this state, for some or one of the purposes mentioned in the before-mentioned article of the constitution of the United States; or, at least, it must appear to the court that Governor's Island is such a place. The plea does not show it; on the contrary, it avers that Governor's Island was under the jurisdiction of the United States. Now, this is not the fact, unless it can be shown that the United States has accepted the jurisdiction, which has not been done, and, I believe, cannot be done. The law of our legislature, above quoted, shows that neither terri-

NEW YORK
Febr'y 1819.

~
The People
v.
Lent.

tory nor jurisdiction was absolutely ceded. The Island was merely made subject to the jurisdiction of the United States, if the United States pleased to exercise jurisdiction over it. No act of congress has been referred to by the counsel for the defendant, nor can I find that any exists by which the United States can be considered as having exercised their exclusive right of legislation as to the place in question; or, indeed, any legislation whatever in respect to crimes committed on Governor's Island, or in any other place ceded to the United States under the 8th article of the constitution, except as to the District of Columbia. The acts of congress organizing the Courts of the United States, make no provision on this subject, and do not give any United States Court cognizance of the crimes committed within the limits of the ceded places.

A law of congress, passed 20th March, 1794, (2 L. U. S. 381. last ed.) provides that certain harbours therein mentioned, of which New York is one, shall be fortified under the direction of the president of the United States. And the same act authorizes the president to receive from any state, in behalf of the United States, a session of the lands on which any of the fortifications, enumerated in the act, might be erected, or where such cessions should not be made, to purchase such lands on behalf of the United States. Provided, that no purchase should be made where such lands were the property of a state.

Under this act, (1 U. S. Laws, 688. new ed.) Ellis and Oyster Islands, situate in the bay of New York, having been private property, were bought by the government of the United States, and they, by the name of Bedlow's and Oyster Islands, together with Governor's Island, by the before mentioned act of our legislature of 1800, were declared thereafter subject to the jurisdiction of the United States; but Governor's Island having been the property of the state, there was no other legislative or executive act, that I have been able to discover, respecting it, either of the state or general government, than those which have above noticed. The United States government seems to have considered the act of our legislature sufficient for its purpose, and to have thought it unnecessary to take any other step.

Supposing, then, that the declaration by our state legislature be equivalent on their part to a transfer to the United States by purchase, yet there is in wanting some act on the part of the United States legislature or government to complete the purchase, or to show an acceptance of the grant, if it may be so called, made by the state.

N^W YORK,
Febr'y, 1819.

The People
v.
Lent.

If the state legislature were to declare that the county of Richmond should be subject to the jurisdiction of the United States, could such a law supersede the state authorities, unless it appeared by some act of the general government, that they wanted and accepted the county of Richmond as a purchase, (I mean a purchase in the technical sense of the word,) for the purpose for which, by the constitution of the United States, the general government has a right to make purchases or acquire territory, within the limits of the respective states?

There is nothing to show that the United States or its government ever applied to have Governor's Island made subject to its jurisdiction, or that they were willing to accept, or ever did accept it, as a place over which they would exercise their power of exclusive legislation.

Congress has shown that, in its opinion, an acceptance on the part of the United States was necessary, to give it power in a territory ceded by the states, under a provision in the same article of the constitution of the United States. After the District of Columbia was ceded by the States of Virginia and Maryland, congress passed an act declaring their acceptance of the session. (1 L. U. S. 132.)

By admitting that Governor's Island is a place, as to which the United States has acquired the power to legislate exclusively, yet to exclude the state authority, I think it should have been shown by the plea, or at least it should otherwise appear, that they have exercised this power given to them by the constitution. And this, it must be conceded, they have not done. No law has been passed by congress, in virtue of which any court of the United States could have recognizance of the offence charged in this indictment. It therefore follows, that if the defendant is not answerable to this court, not only he, but all who may commit crimes even of the greatest enormity in the same place, will be wholly irresponsi-

NEW YORK,
Febr'y, 1819.

The People
v.
Lent.

ble. We should find to our surprise, I think, that we have, in the bosom of our territory, many places where criminals will be more out of the reach of condign punishment than they were of old in cities of refuge, or more modernly in the sanctuaries of bigotry.

I think we are bound to presume, that the national and state legislatures have not been so improvident; and that the state legislature would not have subjected the place in question to the jurisdiction of the United States, and that congress would not have failed to legislate for it, if it had not been understood by both legislatures, that till congress did exercise their exclusive power, the state was to retain its wonted jurisdiction.

Let it be recollected, that in the heart of this populous city, there are several places of this description. One of them is a part of the battery, our great public walk, in which a murder might now be committed with impunity, if the murderer is not punishable by our state laws.

An argument from inconvenience is, to be sure, not conclusive, but it ought to have its influence where it is so manifest.

The opinion that the states individually have, in some instances, concurrent powers with congress, and that in other instances the state governments may exercise powers, which, by the constitution of the United States, are given to congress, but which powers congress refrain from exercising, is not new. The powers given to congress are not necessarily exclusive. Indeed, the introduction to the article of the constitution which specifies the powers of congress, seems cautiously worded, so as to exclude the idea that the state authority was to be superseded as to all objects to which the power of congress is thereby extended. It is said that congress shall have power as to the enumerated objects, and not that they shall have *the* power, or, in other words, all power as to the specified matters.

As to some of the powers given to congress, they are necessarily exclusive from their very nature; because, as to them, separate powers cannot be co-existent; as for example, to borrow money on the credit of the United States, to erect inferior tribunals, &c. But there are others of these powers which are of different charac-

ter, and as to which the authority of the states is not excluded, and as to some matters, congress have the right to exclude the state authority by the exercise of their power to legislate as to these matters. But until congress does exercise their power, the state authority remains.

NEW YORK
Feb'y, 1819.

The People
v.
Lent.

Of this latter description, I consider the power now under consideration—congress have power to, that is, they may exercise exclusive legislation over the places purchased by the consent of the state legislature, as they have done with respect to the District of Columbia. But they are not obliged to exercise that power; and if they do not, the state authority is, in my judgment, unimpaired.

It may be inferred, I think, that our state legislature which passed the law of 1800, under the plea to which the jurisdiction of this court is formed, had this view of the subject. The jurisdiction of the state is not thereby relinquished, as it is by some other laws of our own in relation to other places. Nor is Governor's Island declared to be under the jurisdiction of the United States, but the law declares that it shall, therefore, be subject to the jurisdiction of the United States.

The language of the legislature I understand to mean, that they give their consent that congress may exercise their power exclusively to legislate for Governor's Island; the place is made subject to the exercise of that power; but until it be exercised by congress, it is, in my opinion, to use the words of the twelfth article of the amendments to the constitution of the United States, "a power not prohibited to the state, but reserved to it." I have read with great attention, the case of the Commonwealth v. Clary, (8 Mass. Rep. 72.) decided in the Supreme Judicial Court of Massachusetts. And I hope I need not say, that the opinion of Chief Justice Parsons, has had all that consideration which his high character as a lawyer and a judge must always command. That case and this are not exactly similar. In that case it appeared that a law of Massachusetts gave the consent of that state, that the United States should purchase a tract of 640 acres for erecting forts, &c. That a purchase was made pursuant to that law, of lands which were applied by the United States to the contem-

NEW YORK
Feb'y, 1819.

~
The People
v.
Lent.

plated purpose. Here then, were the concurrent acts of the state and of the United States; whereas in our case, we have nothing to show that the United States ever availed themselves of the power granted by this state.

But with great deference to the distinguished abilities of Chief Justice Parsons, I must be permitted to suggest, that he has made an important mistake in quoting from the constitution, the clause which gives congress power to legislate in respect to places which the United States may acquire with the assent of the states. He says that by the constitution, congress have the exclusive power of legislation as to these places. If this were so, then there could be no question but that, as to them, the authority of the states must immediately cease on their becoming subject to the United States. But this is not the power given to congress by the constitution. By that instrument it is declared that, as to such places, they shall have the power to exercise exclusive legislation. This power they need not exercise unless they think fit, and in our case, have not seen proper to exercise. And, therefore, there is, in my opinion, as yet nothing to preclude the jurisdiction of the state courts; our law, too, which only makes Governor's Island subject to the jurisdiction of the United States, is different from the Massachusetts law, which gave the consent of that state to a purchase by the United States.

But if this opinion of the Massachusetts court be applicable to the case now to be decided, this court, notwithstanding all its respect for the Massachusetts bench, cannot suffer itself to be controlled by it. Was there a positive decision of our own court, or of a superior court of the United States, I should feel myself bound by it; because I hold it the duty of a judge of a subordinate, if not an inferior court, as this is, to acquiesce in the decisions of its superior tribunals; for if any inferior judge feels himself at liberty, on all occasions, to indulge his own speculations, we would be in that condition which is deplored by Lyttleton as miserable, where the laws are vague and uncertain. I shall, with the more reluctance differ from the court of Massachusetts, did I not consider the decision now given as supported by the opinion of our own highest court on analogous points. I refer to the case of Livingston and Fulton against Van

Ingen, (9 Johns. Rep. 507.) decided in the court of **NEW YORK**
Errors. Feb'y 1819.

Inasmuch, therefore, as it is not shown by the plea, or otherwise, and it could not be shown, that the United States have accepted the act of this state respecting Governor's Island, nor that they have exercised the power of exclusive legislation, granted by the constitution to congress as to that island, it is the judgment of the court that the plea be overruled, and that the defendant answer over to the indictment.

The People
v.
Lent.

The whole merits of this case appear on the record, so that the defendant can take it to the Supreme Court with very little trouble and expense; and it is a matter of so much importance in the administration of justice, that we are desirous that it should be settled by higher authority than this court.

COMMON PLEAS.

OHIO, AUGUST, 1816.

<i>United States</i>	}	INFORMATION.
v		
<i>Alexander Campbell.</i>		

The government of the United States cannot make use of the state courts to enforce their penal laws. A proceeding by information under penal law of the United States, is a criminal proceeding, and is contrary to the constitution of the state. Proceeding by information is prohibited by the 10th sect. of the 8th article of the constitution in Ohio

Information filed by J. C. Wright, collector of the revenue for the 6th collection district of Ohio, against Alexander Campbell, for selling domestic distilled spirits without a license therefor from the collector, contrary to the act of congress in such case made and provided, and praying "that the said Alexander Campbell may forfeit and pay to the United States the sum of 150 dollars penalty, and also the farther sum of 15 dollars duty, by law imposed by a license to retail," &c. "according to the provisions of the acts of congress in such cases made and provided," &c.

The defendant filed the following exceptions to the jurisdiction of this court.

"And the said Alexander Campbell says, that the information filed against him by John C. Wright, collector, contains no matter or thing to which he, the said Alex-

OHIO,
Aug. 1816.
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United States  
v.  
Campbell

ander Campbell, is in this court bound to answer, for that the retailing liquor by the quart is not an offence against any of the laws of the state of Ohio, of offences against which laws only this court can take jurisdiction—and for that also by the constitution of of the state of Ohio, no man can be held to answer any offence in the courts of the said state except upon indictment or presentment of a grand jury, wherefore the said Alexander Campbell prays that he may be discharged from answering said information, and that the same may be quashed.—C. Hammond, attorney for defendant.”

Judge *Tappan*.—This is a very important question of jurisdiction, upon which, if I had doubts, I would take farther time to deliberate before giving an opinion: as I have none, I will not delay the cause by a continuance, but proceed to give my opinion, notwithstanding the pressure of business may prevent my adverting to many of the reasons and grounds whereon that opinion is founded.

There can be no hesitation in asserting that a proceeding by information is a criminal prosecution, and that it hath always been used as such. 4 Bl. Com. chap. 23. The King v. Berchet and others, 1 Shower, 106. I refer to these authorities as fully supporting both propositions.

The first question will then be, can the United States prosecute for offences against their laws in the state courts?

This will depend upon the constitution of the United States, and the constitution of this state.

The state of Ohio is a sovereign and independent state, not controllable by any earthly power in the making or administration of its laws, except only in such particulars as it has delegated a portion of that sovereignty to the United States by the federal constitution, and as it hath limited itself in the exercise of power by the same constitution.

The constitution of the United States creates a district and separate government from the several state governments, and delegates specified and limited powers to the government so created. By the 3d article, sections 1 and 2, the judicial power of the United States shall be vested in one supreme court, and in such inferior courts

as the congress may from time to time ordain and establish; and "the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty, and maritime jurisdiction; to controversies to which the United States shall be a party," &c. The judicial power of the United States extends to the case now before this court, and that power is wholly vested in the United States' courts. The Supreme Court of the United States hath an appellate jurisdiction in all controversies to which the United States shall be a party; there is no clause in the constitution of the United States which authorizes congress to give jurisdiction to the state courts, or to require the performance of any judicial duties of them; it cannot be said that congress by their laws ordained and established us a court of the United States; for by the operation of the 8th sect. of the 3d article of the constitution of this state, if such were the fact, we should cease to be a state court; and will it be imagined that an appeal can be taken from this court to the Supreme Court of the United States? The powers not delegated to the United States by the constitution are expressly reserved to the states, or to the people; it follows necessarily, and clearly to my mind, that congress have no power to vest any jurisdiction whatever in the state courts.

This is a criminal prosecution; it may well be doubted whether one sovereign state can sue in the municipal courts of another state; but waiving this point, as not necessary to be here decided, I assume it to be a settled principle in jurisprudence, that one sovereign state cannot make use of the municipal courts of another government to enforce its penal laws. No one would doubt, for an instant, if the government of Great Britain or France, or even one of the other states of the Union, were to attempt to maintain a criminal prosecution in our courts, that it would not be permitted; and yet as to its judicial power, and its penal laws, the government of the United States is as much an independent state and separate government as Great Britain, France, or either of the United States.

OHIO,  
Aug. 1816.

United States  
v.  
Campbell.

OHIO,  
Aug. 1816.

United States  
v.  
Campbell.

It hath been urged, that the constitution gives to congress the power to lay and collect taxes, duties, imposts, excises, &c. and to make all laws which shall be necessary and proper for carrying that power into execution; that to collect the excise, they have judged it necessary to vest a jurisdiction in certain cases in the state courts. If they have judged it to be necessary, they have been mistaken: convenience is not necessity; their own tribunals are sufficient to enforce their laws. If it be true, that congress, under this provision of the constitution, may pass any laws they deem necessary to carry their specific powers into execution, and are the sole judges of such necessity, where are they to stop? Possessing the sword and the purse of the whole confederacy, nothing more than the establishment of such a principle is wanting to vest congress with absolute power, and to effect a complete consolidation of the states. We have seen that the constitution of the United States doth not give congress the power of vesting jurisdiction in the state courts; the constitution and laws of the state of Ohio do not give us jurisdiction, nor can we sustain it on general principles of law.

An opinion has been read, in which it is stated, that the third article of the constitution of the United States, vests in the government of the United States a privilege of having their causes determined in their own courts; and that this privilege may be waived by them. By the 1st art. of the constitution, the legislative powers of the United States are vested in congress. By the 2d, the executive power of the United States is vested in a president. I do not see why this doctrine of privilege and waiver, may not, with as much reason be applied to the legislative and executive, as to the judicial power, and so the whole government of the United States be waved. This theory is new—it is beyond my comprehension.

The second question raised in this case is, whether the court can sustain a criminal prosecution by information under the constitution of this state.

By the 10th section of the 8th article of the constitution of Ohio, it is declared, "That no person arrested or confined in jail shall be put to answer any criminal charge, but by presentment, indictment, or impeachment."

An information is as much a criminal prosecution as an indictment: the same process issues on the one as on the other—to bring the person charged or informed against before the court, and that process with us is a *capias*. The defendant has been taken by a *capias*, and is now holden to answer this information.

I think that a fair construction of our constitution requires us to say, that the proceeding by information is prohibited by it. If we examine the history of informations, we find that they have crept into use against the plain meaning of magna charta: that although in England a series of precedents support them, yet they are neither suited to our principles of government, nor countenanced or permitted by the state constitution. Such is the unanimous opinion of the court.

OHIO,  
Aug. 1816.  
United States  
v.  
Campbell.

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*Decision of the Hon. Langdon Cheeves, in the case of Andrew Rhodes, delivered at Chambers, on a writ of Habeas Corpus ad Subjiciendum.*

*Ex parte* }  
*Andrew Rhodes.* } HABEAS CORPUS.

*Edward P. Simons, Esq.,* Counsel for the Prisoner.

*Thomas Parker,* Counsel for the United States.

The prisoner is brought before me, at Chambers, on a writ of *Habeas Corpus ad Subjiciendum*, and the officer in whose custody he is, exhibits as the authority by which he detains him, a warrant of commitment under the hand and seal of John Hinckley Mitchell, a justice of the peace of this state, on a charge that the prisoner has forged or counterfeited a number of protections for American seamen. This, it is believed, is no offence against this state, but is an offence against the laws of the United States.

The act of granting a warrant of commitment is a ministerial and not a judicial act.

The judicial power of the United States under the 1st section and 3d article of the constitution, in criminal cases, is not exclusive of the authority of the States. Congress has a right to con-

I am called upon, on the part of the prisoner, to discharge him from custody, under this warrant, because it contains no accusation under the laws of the state, and it is contended, the magistrate who committed him, being an officer of the state, had no authority to commit

CHAMBERS

Ex Parte  
Rhodes.

stitute any citizen of the United States a conservator of the peace, although conservators of the state. The 33d section of the act of September 24, 1789, is constitutional.

him for an offence against the United States, because the 33d section of the judiciary act, (Laws U. S. vol. 1. p. 72.) which in its terms authorizes such commitments, is unconstitutional.

It is contended,

1st. That by the 1st section of the 2d article of the constitution of the United States, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts, as congress shall, from time to time ordain and establish"—and that this judicial power, in criminal cases, is, under the constitution, exclusive of the authority of the states.

2d. That the act of granting a warrant of commitment is a judicial act, and therefore, in cases under the laws of the United States, to be exclusively performed by an officer of the United States.

3d. That it is my duty, as a judge of this state, under the habeas corpus act, to take cognizance of this case on the grounds stated.

1st. All these questions are important and difficult; and the first is of peculiar importance. It has been a controverted question from a period anterior to the adoption of the constitution of the United States, and still remains unsettled; and I am happy to be relieved by the opinions I have formed on the other questions, which the case presents, from the necessity of deciding this.

2d. Is the act of granting a warrant of commitment a judicial act? I think it is not. I am aware of a late decision (the case of Joseph Almedia, in Maryland) in which this question has been determined in the affirmative. In this opinion I cannot concur. The only authority which is relied upon to support this opinion, is a single expression contained in the decision of the Supreme Court of the United States, in the case of the United States v. Judge Laurence. (3 Dallas' Rep. 53.) This authority, it is evident, has been misconceived. That was a case in which, under our consular convention with France, Judge Laurence, who was then the district judge of the United States for the district of New York, had been required, by the vice consul of the French republic, to issue a warrant for apprehending captain Barre, commander of the frigate *Le Perdrix*,

See post.

belonging to the French republic, as a deserter. The judge was of opinion, that before the warrant could issue, the consul should prove by the register of the ship or roll d'equipage, that captain Barre was one of the crew of the *Le Perdrix*. The counsel offered other proof; but the judge thought this indispensable; whereupon an application was made to the supreme court for a mandamus, to compel the judge to issue a warrant. The court, in deciding the case, refused the mandamus, and in giving their reasons, say, "It is evident that the district judge was acting in a judicial capacity, when he determined that the evidence was not sufficient to authorize his issuing a warrant." It is very manifest that it is to his judgment on the evidence the court allude, when they say he was acting in a judicial capacity, and for that reason they refuse to issue a mandamus, and founding their judgment on this distinction, they virtually declare, that the granting a warrant of commitment is not a judicial act. I am aware it may be said, as all commitments must be founded on some evidence, in all cases of commitment a judicial act must be performed. There is certainly an opinion to be formed on the nature and sufficiency of the evidence adduced; but if such an exercise of the mind be a judicial act, then almost every function of all the inferior officers of justice will be judicial, and even constables, who have, in certain cases, the power of commitment, will be judicial officers. This is preposterous. There must be some more correct view of the subject, and to obtain it let us resort to authorities. Our object is to ascertain whether the function of a justice of the peace, in granting a warrant of commitment, be judicial or ministerial. It is not denied, that a justice of the peace does possess certain judicial powers, but it is denied that the granting a commitment is a judicial act. We must carefully distinguish between the original duties of a justice of the peace and those which have been subsequently imposed upon him. The first constituted him merely a conservator of the peace, the latter have made him a judicial officer; the first authorized him to apprehend and commit offenders, the latter, in many cases, have conferred upon him the powers to try and convict.

Sir William Blackstone, (1 Com. 351.) after speaking

CHAMBERS

Ex parte  
Rhodes.

CHAMBERS of the occasion of the first appointment of these officers, says, "It was ordained in parliament that for the better maintaining and keeping of the peace, in every county, good men and lawful, which were no maintainers of evil, or barrators in the county, should be assigned to keep the peace; and in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people and given to the king; this assignment being construed to be by the king's commission: but still they were only conservators, wardens or keepers of the peace till the statute 34 Ed. 3. c. 1. gave them the power of trying felonies, then they acquired the more honourable appellation of justices."

Ex parte  
Rhodes.

"The power, office and duty of a justice of the peace depends on his commission, and on the several statutes which have created objects of his jurisdiction. His commission first empowers him singly to conserve the peace, and thereby gives him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other criminals." (Id. 353, 354.)

Who are these conservators of the peace who possess the same authority to commit as justices of the peace? Are they judicial officers? Among others, sheriffs are conservators of the peace. "Constables, tithingmen, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace, and commit them till they find sureties for their keeping it." (Jacob's Law Dict. tit. Conservator of the Peace, vol. 2. p. 26.) "Conservators of the peace did commit at common law, and it was incident to their office, as it is to the office of justices of the peace who are not authorized by any express words in their commission, but do it, *ratione officii*," (15 Vin. 8. tit. Justices of the Peace.)

"It seems that the power of such conservators of the peace, whether by tenure, election, or prescription, was no greater than that of constables at this day, unless it were enlarged by some special grant or prescription." (Ibid 4.)

Holt, Ch. J. said he knew not whether, at first, justices of the peace were more than high constables; but the

statute that made them complete judges is that of 34 Ed. CHAMBERS  
3. (Ibid.)

Lord Hale, in his analysis of the law, after having said that there are two kinds of subordinate civil magistrates, those that have a power of jurisdiction, and those that are without jurisdiction, says, "The persons that exercise this power, or jurisdiction, are called judges or judicial officers," (sec. 11. p. 26, 27.) and in sec. 12. "of inferior magistrates *sine jurisdictione*," (p. 29.) he speaks thus: "The sheriff of the county is the greatest ministerial officer; and I call him magistrate because he is a conservator of the peace of the county," &c. &c. "Constables and head constables. These, though they have not any jurisdiction to hold cognizance of any fact, yet are conservators of the peace."

Ex parte  
Rhodes.

Dr. Sullivan, in his Commentary on Magna Charta, speaking of the warrant of commitment, says, "Thirdly, the warrant must not only contain a lawful cause but have a legal conclusion, and him safely keep until delivered by law; not until the party committing doth farther order: for that would be to make the magistrate, who is only ministerial, judicial, as to the point of the liberty of the subject." Lectures on the Constitution and Laws of England, (vol. 2. p. 266.)

I presume I have now established beyond all doubt that the act of the magistrate, in granting a warrant of commitment, is a ministerial, and not a judicial act. It may be useful, however, to spend a moment longer on the nature of that judicial power which is spoken of in the constitution. There are functions to be performed by inferior magistrates, commissioners and other like officers, which leave in them a discretion, which in that particular, resembles judicial authority, but is not of the nature of that judicial power which forms one great branch of government. It is the latter, which is spoken of in the constitution. It is that which Lord Hale defines to be "a power of jurisdiction," and of which he farther says, "the persons who exercise this power or jurisdiction are called judges or judicial officers; the places or tribunals wherein they exercise their power, are called courts; and the right by which they exercise that power is called jurisdiction." (Analysis, sec. 11. p. 26, 27.) He then goes on to enumerate the superior

CHAMBERS

Ex parte  
Rhodes.

and inferior courts of England, and gives us a clear and distinct idea of what may be embraced, and what is meant by the 3d art. of the constitution on this point. They both mean to speak of trial, judgment, emphatically of the administration of justice, and not the little functions and functionaries, which are merely incipient and ancillary to this great essential power, which are inseparably incident to it, and can with no propriety be called implied powers.

If it has been proved that the act of the magistrate in committing an offender is a ministerial act, then the ground on which the counsel for the prisoner has put this argument, which is the same relied upon in the case of Almeida, though he has enforced it with ability and eloquence, entirely fails.

The only question that remains is, whether the legislature of the United States has a right by a statute, forbidden by no provision of the constitution of the United States, to give a limited authority to conserve the peace to one or more of the citizens and subjects of the said United States, who happen at the same time to be conservators of the peace of the state? If not forbidden by the constitution of the United States, what other power can forbid it? That constitution expressly forbids all it does not authorize. If not so forbidden, the statute is the supreme law of the land. All the minor arguments of expediency, such as blending jurisdictions, neglect of state duties, want of responsibility and others of the same description, are of little weight in themselves, and are not for judicial, but legislative consideration. Throughout the whole system of the government, the legislative, judicial and executive functions of the union and the states are blended; the responsibility of the citizen is divided, and duties to the states are superseded by duties to the union. But what then? Is it for judges, therefore, to say, they deem them inexpedient, and because they deem them inexpedient declare them void? I will not say that expediency shall be always rejected in a judicial judgment on the meaning of the constitution, but it will seldom be a very weighty consideration, and ought always to be used very cautiously. But I think it highly expedient, that congress should confer this authority on the ministerial officers of the states. It is as

useful to the states as the union, that the crimes against the United States should be punished. Their interests can seldom, perhaps never, be wisely separated. The crimes punishable under the laws of the United States are great and important, but few in number. Without the aid of the ministerial officers of the states, to have the laws of the United States effectually executed against a few offenders, (probably not one hundred in a year in all the states) it would be necessary to appoint and scatter over their vast territory many thousands of justices of the peace, coroners, constables, &c. The attempt to execute the power, would be as impracticable as it would be ludicrous. But it is said the states are to watch with jealousy the acts of the general government, (a monstrous heresy in the politics of this country,) and if it use the agency of the officers of the states, it will have a tendency to a consolidation of the state governments.

CHAMBERS

Ex parte  
Rhodes.

Exactly the reverse is the sound conclusion. The necessary dependence, practically, of the general government on the states, in many particulars, is one of the points in which its weakness has been most obvious and most lamented.

The counsel for the prisoner, taking it to be granted or proved that the act of the magistrate was a judicial act, contending that the constitution had established a mode in which all judicial officers were to be appointed, and that an act of congress, giving authority to the magistrates of the state, was a violation of this provision of the constitution. It would not follow, however, if the function were judicial, that the appointment must be made by the president and senate; for the constitution authorizes congress, by law, to vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments; but the function is not judicial; the officer, consequently, not judicial; and, therefore, the argument, as urged, does not apply. But it may, perhaps, be insisted, that though the constitution does authorize congress, by law, to vest the appointment of inferior officers in the president alone, in the courts of law, or in the heads of departments, it does not authorize congress, though both houses and the president should unanimous-

"HAMBERS ly concur, itself to appoint immediately by law. This would really be construing the constitution like an old pleading, without allowing the benefit of the statutes of Joefails.—*Qui cadit a syllaba, cadit a tota causa.* A rational construction, it would seem, would authorize congress to do itself what it can, at its pleasure, authorize an inferior body or an individual to do; but that is not the question. It may be safely admitted, that congress cannot directly by law appoint an officer whom it can authorize an individual to appoint, and yet the difficulty will not occur in this case. This is not the case of an appointment. The magistrates of the state are not by the act of congress, constituted officers of the United States. They are merely authorized to do a certain act. The case may be easily conceived in which a magistrate of a foreign state may, by act of congress, be authorized to exercise an equivalent power. That it is not an appointment in the sense of the constitution, will be proved by reference to the undisputed practice of some of the state governments.

Ex parte  
Rhodes.

The constitution of Pennsylvania provides that the governor shall appoint justices of the peace; (art. 5. sec. 10.) and that they shall be commissioned during good behaviour. But by an act of the legislature of that state, passed 20th March, 1810, all the powers of justices of the peace are vested in all the aldermen of the city of Philadelphia, who, I believe, are elected annually by the people of that city.

So, in New York, justices of the peace are appointed by the governor and council, according to the express requisition of the constitution, and hold their offices during the pleasure of the governor and council. But by an act of the legislature of that state, (2 Laws of New York, 508.) the aldermen of the city of New York, Albany and Hudson, are vested with the same powers as justices of the peace.

By the constitution of South Carolina, justices of the peace shall be nominated by the senate and house of representatives, jointly, and commissioned by the governor. (1 Brevard, 468. 2 Brevard, 175.) Yet the clerks of the courts, the wardens of the city of Charleston, and many other officers of the state, are vested by act of the legislature with the powers of justices of the peace. The

like case probably occurs in almost every state of the union, and the argument of unconstitutionality which we are now examining will equally apply to them all.

CHAMBERS,  
Ex parte  
Rhodes;

I am then satisfied, that in relation to the case before me, the 33d section of the act of congress, commonly called the judicial act, is constitutional and expedient, though I reject the argument of expediency, from the grounds on which I rest my decision. It is not a case in which I have a right to weigh it.

3d. I might here leave the case; but I deem it proper to consider the third ground. I think I have no jurisdiction over the case. I am aware of but three cases in which this question had been made. The case of Almeida, already mentioned; the case of Emanuel Roberts, (2 Hall's Law Journal, 192,) in Maryland; and the case of Jeremiah Ferguson, in New York, (9 Johns. Rep. 239.) In the first case jurisdiction was assumed, and the prisoner discharged. The second was the case of a minor enlisted in the service of the United States, and Nicholson, chief judge, determined against the jurisdiction. He does, indeed, say, in speaking of an extreme case which was put by counsel, of great oppression and injustice, that he would interpose and discharge the prisoner in the case supposed, but he adds, "If in such a case I should exceed the technical limits of my authority, I should have the approbation of all good men, for resisting oppression under the colour of law." This is certainly no argument in favour of jurisdiction, while the judgment in the case is on the want of it. In the last case, which was also the case of a minor who had been enlisted, the court refused to interfere on other grounds. But Chief Justice Kent declares explicitly, that the state courts have not jurisdiction where the arrest is under the authority of the United States. In this opinion I concur. If there be cases in which the state courts have jurisdiction of the principal matter, I am of opinion they may entertain an incidental or collateral question; they may, therefore, in such cases, release under a writ of habeas corpus, on the ground of illegal confinement, because the prosecution is groundless, or for other sufficient cause. This authority may, perhaps, be exercised by courts having a superintending power, though they may not have

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CHAMBERS

Ex parte  
Rhodes.

jurisdiction for the purpose of trial, for they have authority to restrain and annul the acts of inferior jurisdictions. But in a case like the present, where the state courts in no case, and under no circumstances, can take cognizance of the offence charged, to punish or acquit, and where the functionary appealed to is himself, in all questions under the laws of the United States, subject to the control of their high tribunals, all pretence of jurisdiction seems to vanish. I cannot, nor can all the judicial authority of the state, discharge a defendant in a civil suit who has been held to bail in the courts of the United States, however illegal the arrest may be, because I have no jurisdiction; and yet it is seriously imagined that I have, at my chambers, authority to take their criminal jurisdiction, which is by their laws expressly exclusive, out of the hands of their tribunals, and to determine the acts of the national legislature unconstitutional and void. Nay, more, in this state any two justices of the peace, one of whom shall be of the quorum, have authority to carry the habeas corpus act into execution, and have on the subject all the authority I enjoy. They, too, then, have a right to determine on the constitutionality of the acts of congress, and to release those who are amenable to the United States in their criminal courts. But the pretence for all this is, that the liberty of the citizen is to be preserved inviolate. Is it meant by this, that he shall be exempt from all the usual modes of trial instituted for the preservation of that very liberty? That the march of justice is to be divested of every thing staid and sober? That instead of her solemn and learned judgments, we are to have *pie poudre* expositions of the great act of our national union? But against whom do we seek this protection? The government of the United States—the government of the people themselves, whose greatest power returns into their hands biennially, and all of it at short intervals—a government as able, as much bound, and no doubt as willing to protect the citizen as the governments of the states—a government which has its habeas corpus act, and its judges bound under the most solemn sanctions to execute it—a government to which the states constitutionally look up for the preservation of their free institutions. That jealousy which we sometimes see recommended,

is bad law, and worse policy. I deny that it is inculcated by a true understanding of the constitutions of the states. That it is necessary to the preservation of state rights, or that it can conduce to national happiness, or national greatness. It may make us busy about some little factious privileges which are in no danger. But a regulated liberty, under the protection of stable institutions, will be best and longest secured to us, by regarding the government of the union in a spirit full of confidence—in a temper devoid of jealousy.

CHAMBERS.

Ex parte  
Rhodes.

Finally, I am of opinion I have no jurisdiction of the case. Let the prisoner be remanded,

*Opinion of Chief Justice Marshall, relative to the collection of Militia fines.*

William Meade

v.

The Deputy Marshal of  
the district of Virginia.

MOTION TO BE DISCHARGED  
UNDER A WRIT OF HABEAS  
CORPUS.

By the return of the deputy marshal, it appears that William Meade, the petitioner, was taken into custody by him, and is detained in custody on account of the non-payment of a fine of forty-eight dollars, assessed upon him by the sentence of a court martial for failing to take the field in pursuance of general orders of the 24th of March, 1813, the marshal not having found property whereof the said fine might have been made.

Construction  
of the 5th sec.  
of the act of  
congress 1795,  
in relation to  
courtmartials.

The court-martial was convened by the following order:  
*November 8th, 1813.*

**BRIGADE ORDER.**—A general court-martial to consist of Lieutenant Colonel Mason, president, &c. will convene at the court-house in Leesburg, on Friday the 3d day of next month, for the trial of delinquencies which occurred under the requisition of the governor of Virginia and secretary of war, for militia from the county of Loudon.

(Signed)

HUGH DOUGLASS.

*Brig. gen. 6th Brig. of Va. M.*

The court being convened, the following proceedings were had. It appearing, to the satisfaction of the court, that the following persons of the county of Loudon were

Wm. Meade v. The Deputy Marshal of the district of Virginia. regularly detailed for militia duty, and were required to take the field under general orders of March 24th, 1813, but refused or failed to comply therewith, whereupon this court doth order and adjudge, that they be each severally fined the sum annexed to their names, "to wit, William Meade, \$48." On the part of the petitioner the obligation of this sentence is denied.

1st. Because it is a court sitting under the authority of the state, and not of the United States.

2d. It has not proceeded according to the laws of the state, nor is it constituted according to these laws.

3d. Because the court proceeded without notice.

1. The court was unquestionably convened by the authority of the state, and sat as a state court. It is, however, contended, that the marshal may collect fines assessed by a state court for the failure of a militia man to take the field in pursuance of orders of the president of the United States. The constitution of the United States gives power to congress to provide for calling forth the militia to execute the laws of the union, &c. In the execution of this power, it is not doubted that congress may provide the means of punishing those who shall fail to obey the requisition made in pursuance of the laws of the union, and may prescribe the mode of proceeding against such delinquents, and the tribunals before which such proceedings should be had. Indeed, it would seem reasonable to expect that all proceedings against delinquents should rest on the authority of that power which had been offended by the delinquency. This idea must be retained while considering the act of congress. The first section of the act of 1795, authorizes the president, "whenever the United States shall be invaded, or in imminent danger of invasion," to call forth such number of the militia of the state or states most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasions, and to issue his orders for that purpose to the officer or officers of the militia as he may think proper."

The 5th section enacts "that every officer, non-commissioned officer, or private, of the militia, who shall fail to obey the orders of the president of the United States in any of the cases before recited, shall forfeit a sum not exceeding one year's pay, and no less than one month's pay, to be determined and adjudged by a court martial."

The 6th section enacts "that courts martial for the trial of militia shall be composed of militia officers only."

Wm. Meade

v.  
The Deputy  
Marshal of the  
district of Vir-  
ginia.

Upon these sections depends the question whether courts martial for the assessment of fines against delinquent militiamen should be constituted under the authority of the United States, or of the state to which the delinquent belongs. The idea originally suggested that the tribunal for the trial of the offence should be constituted by, or derive its authority from, the government against which the offence had been committed, would seem to require that the court thus referred to in general terms, should be a court sitting under the authority of the United States. It would be reasonable to expect that if the power were to be devolved on the court of a state government, that more explicit terms would be used for conveying it. And it seems also to be a reasonable construction, that the legislature, when in the sixth section providing a court martial for the trial of militia, held in mind the offences described in the preceding sections, and to be submitted to a court martial. If the offences described in the fifth section are to be tried by a court constituted according to the provisions of the sixth section, then we should be led by the language of the section to suppose that congress had in contemplation a court formed of officers in actual service, since the provision that it "should be composed of militia officers only" would be otherwise nugatory. This construction derives some aid from the act of 1814. By that act, courts martial for the trial of offences, such as that with which Mr. Meade is charged, are to be appointed according to the rules prescribed by the articles of war. The court, in the present case, is not appointed according to those rules. The only argument which occurs to me against this reasoning grows out of the inconvenience arising from trying delinquent militiamen who remain at home, by a court martial composed of officers in actual service. This inconvenience may be great, and well deserves the consideration of congress: but in so construing a law as to devolve on courts sitting under the authority of the state, a power, which in its nature, belongs to the United States. If, however, this should be the proper construction, then the court must be constituted according to the law of the state.

On examining the laws of Virginia, it appears that no court martial could be called for the assessment of fines on

Wm. Meade  
v.  
The Deputy  
Marshal of the  
district of Vir-  
ginia.

the trial of privates not in actual service. This duty is performed by the courts of inquiry; and a second court must sit to receive the excuses of those against whom a previous court may have assessed fines, before the sentence becomes final, or can be executed. If it be supposed, that the act of congress has conferred the jurisdiction against delinquent militia privates on courts martial constituted as those are for the trial of officers, still this court has proceeded in such manner that its sentence cannot be sustained.

It is a principle of natural justice, with which courts are never at liberty to dispense, unless under the mandate of positive laws, that no person shall be condemned unheard, or without an opportunity of being heard.

There is no law authorizing courts martial to proceed against any person without notice, consequently such proceeding is entitled unlawful. In the case of the courts of inquiry, sitting under the authority of the state, the practice has, I believe, prevailed to proceed in the first place without notice; but this inconvenience is in some degree remedied by a second court; and I am by no means prepared for such a construction of the act as would justify rendering this sentence final without substantial notice; but be this as it may, there is a court martial, not a court of inquiry, and no laws exist, authorizing a court martial to proceed without notice. In this case the court appears so to have proceeded; for this reason, I consider its sentence as entirely nugatory, and do therefore direct the petitioner to be discharged from the custody of the marshal

CIRCUIT COURT U. S.

KENTUCKY DISTRICT, NOV. 8th, 1806.

|                      |   |              |
|----------------------|---|--------------|
| <i>United States</i> | } | MISDEMEANOR. |
| <i>v.</i>            |   |              |
| <i>Aaron Burr.</i>   |   |              |

Present—Honourable *H. Innes*, Judge.

The Attorney for the United States, on the 3d day of this term, having made a motion for the caption and examination of the said Burr, &c.

Discretion of  
the court to  
award process  
upon motions.

The court this day delivered the following opinion, which is ordered to be entered of record, to wit:

The motion made by Mr. Attorney on the third day of this term is predicated upon the 5th section of the act of congress, entitled an act in addition to the act for the punishment of certain crimes against the United States. "That if any person shall within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, with whom the United States are at peace; every such person so offending, shall, upon conviction be adjudged guilty of a high misdemeanor, and shall suffer fine and imprisonment at the discretion of the court in which the conviction shall be had, so as that such fine shall not exceed three thousand dollars, nor the term of imprisonment be more than three years."

The evidence in support of the motion, is in the following words, viz. J. H. Daviess, attorney for the said United States, in and for said district, upon his corporal oath, doth depose and say, that the deponent is informed, and doth verily believe, that a certain Aaron Burr, Esq., late Vice President of the said United States, for several months past, hath been, and is now, engaged in preparing and setting on foot, and in providing and preparing the means

KENTUCKY, for a military expedition and enterprise, within this district, for the purpose of descending the Ohio and Mississippi therewith, and making war upon the subjects of the King of Spain, who are now in a state of peace with the people of the United States, to wit, on the province of Mexico, on the westwardly side of Louisiana, which appertain and belong to the king of Spain, an European prince, with whom the United States are at peace.

Nov. 1806.  
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 United States
 v.
 Burr.

And said deponent farther saith, that he is informed and fully believes, that the above charge can and will be fully substantiated by evidence, provided this honourable court will grant compulsory process to bring in witnesses to testify thereto.

And this deponent farther saith, that he is informed, and verily believes, that the agents and emissaries of the said Burr, have purchased up, and are continuing to purchase large stores of provisions, as if for an army, while the said Burr seems to conceal in great mystery from the people at large, his purposes and projects; and while the minds of the good people of this district seem agitated with the current rumour, that a military expedition against some neighbouring power is preparing by the said Aaron Burr.

Wherefore, said attorney, on behalf of said United States, prays that due process issue to compel the personal appearance of the said Aaron Burr in this court, and also of such witnesses as may be necessary in behalf of the said United States; and that this honourable court will duly recognize the said Aaron Burr, to answer such charge as may be preferred against him in the premises. And in the meantime, that he desist and refrain from all farther preparation and proceeding in the said armament within the said United States, or the territories or dependencies thereof.

J. H. DAVIESS, A. U. S.


Affirmed to in open court.

(Attest.) T. TUNSTALL, C. K. D. C.

Nov. 5th, 1806.

The question to be considered:—Has this court power to award process against the accused, and to compel the attendance of witnesses upon this motion; and if the

court has such power, is the evidence adduced sufficient to warrant the measure? KENTUCKY,
Nov. 1806.

Four kinds of proceeding have been known and pursued in order to convict persons of crimes and misdemeanors :  United States
v.
Burr.

1st. By an application to a justice or judge out of court.

2d. By preferring an indictment to a grand jury.

3d. By a presentment of the grand jury. And the

4th. By information.

The present application is not embraced by either of those modes of proceeding. It is a new case resting on the discretion of the court; and as this decision may be considered a precedent in future, I have thought it my duty to take time and mature the subject; because the proposed measure being prevention, no injury could arise by a little delay.

No instance has occurred (within my recollection, since I have become acquainted with judicial proceedings, when a crime or misdemeanor has been committed,) of a motion being made to a court to award process to arrest the offender in the first instance; neither have I knowledge of the existence of a law to authorize it.

In any case where a court awards process, it is predicated upon some previous act already done, which gives the court cognizance of the subject, and brings the case in a legal shape before that tribunal: this being performed, the power to adopt every necessary measure to attain the object and end of the law, and to perfect justice, is vested in a court.

The magnitude of this cause, not only as it relates to the community, but to the accused, requires that the proceeding be pursued with regularity, caution, and circumspection. If the facts stated in the affidavit be true, the project ought to be prevented, and the offender punished. Yet, in doing this, the regular legal steps, pointed out by usage, or by law, ought to be pursued. If, on the other hand, the accused be innocent, the strong arm of power ought to be confined within its proper limits, the known rules of proceeding: and on no occasion but extreme necessity, ought a judge to be induced to exercise a power which rests on discretion. The law then becomes unknown, and the best judge may be considered

KENTUCKY,
Nov. 1806.

United States
v.
Burr.

a tyrant, because it then depends upon his whim, and his caprice. It will not be uniform, but it is liable to change with the opinion of every judge.

These reflections extend to the general principle arising out of the case. Admit, however, that they are erroneous; to award process, would be improper; it would be an act of oppression, because there is not legal evidence before the court to authorize an arrest of the person accused. The evidence is the oath of a person who has been informed by one not upon oath; and the deponent believes the fact to be true. I make no doubt of the truth of the affidavit; that is, that the deponent has been informed that the fact stated is true; yet it is not legal evidence, and not being legal evidence, the court cannot act upon it.

Upon this view of the subject, I am compelled to declare, that as the cause is a new one; as no precedent has been shown to justify such a proceeding; as the law is silent upon the subject; and as there are two other modes of proceeding, which are regular, and well understood, viz. by applying to the judge out of court, and attaining a warrant upon legal evidence, or by the court ordering a grand jury to be summoned instantler, and preferring an indictment, this motion is overruled.

The attorney for the United States then prayed the judge to issue his warrant to the marshal, to summon a grand jury; which was done accordingly.

Judge Hanson's opinion, delivered in Baltimore County Court on the return of a writ of HABEAS CORPUS, in the case of JOSEPH ALMEIDA, who was imprisoned in virtue of a warrant issued by a Justice of the Peace of the state of Maryland for a supposed breach of a law of the United States.

The 33d sec
of the act of
September 24.
1789, which
invests judi-
cial officers of
a state with

The argument in this case had not proceeded very far, before it was manifest to me, that the learned attorney for the United States was entrammelled in a dilemma, from which all his ingenuity could not extricate him. If a justice of the peace of the state of Maryland had

any legal power to arrest a person charged with an offence against the United States, it follows as a dictate of common sense, that there must, independent of the laws of congress purporting to give jurisdiction to state tribunals, reside somewhere in the state, as an essential component of the sovereign and protecting power, it has a right to exercise over and in behalf of all persons within limits, a right of deciding whether or not that arrest was properly made; and, consequently, that if Thomas W. Griffith, Esq. had the power of issuing a commitment, this court has the power of ordering a habeas corpus, and upon its return, not only of deciding the sufficiency of the return itself, but of adjudging whether or not that intelligent officer in this case, in issuing his warrant, acted substantially in conformity to the established principles of law, regulating the subject of commitment. To the warrant, in the present case, there is scarcely one among the many objections that have been made to it, which has not been ably and fully sustained. One single material defect is, however, sufficient to invalidate it; and *that* of the omission to make it returnable, at any time, or before any person, affords, of itself, ample reason for quashing all authority derived from it. No proceeding, under the colour of law, can be more susceptible of being wrought into an engine of oppressive power, than that of depriving an individual of his liberty, and of consigning him to imprisonment upon an "*ex parte* hearing." Every freeman has a right to be confronted with the witness against him, in all stages of his accusation; the privilege is inherent, and the right to demand the enjoyment of proving his innocence simultaneous with the first step of the prosecution. Before, therefore, any commitment can be lawfully made, the accused is entitled to an opportunity of showing, either that the act he is charged with is no crime in the eye of the law—that if any wrong has been done he is not the perpetrator of it; or that however strong the evidence may be against him, the offence alleged is of a class justifying the discharge of his person, upon the production of such bail as may be legally required of him. If the condition of society were otherwise, the time would have arrived, ere now, when the occasion and the disposition would have presented themselves of deciding all such questions in a

MARYLAND.

United States

v.
Almeida.

power to arrest, &c. for criminal offences against the United States declared constitutional.

A warrant of arrest not returnable at any time, or before any person, is void.

A prisoner has a right to be confronted with the witness against him, in all stages of the accusation: the privilege is inherent, and the right to demand the enjoyment of proving his innocence simultaneous with the first step of the prosecution.

Arguments "*ad inconvenienti*," 578, 579.

Arguments in favour of state rights. 580, 581, 582.

MARYLAND. very summary way. These preliminary points being settled, it becomes necessary to decide the main question, in which the whole of the case has resolved itself. That is to say, whether this court has power to commit for an alleged offence against the United States; and going one step farther, whether a law of congress can confer any judicial power upon state tribunals?

United States
v.
Almeida.

Although the adjudication of this point devolves upon us the duty of passing upon one of the greatest judicial questions, that of the constitutionality of a law of congress, yet, as every court is bound and presumed to know its own jurisdiction, we cannot avoid deciding whether we derive any jurisdiction from the law of the United States, passed in the year seventeen hundred and eighty nine, organizing the judiciary of the national government; and consequently whether the 33d section, and, indeed, many other sections, are constitutional. Notwithstanding this point has been expressly decided in Virginia and in Ohio, and collaterally in the supreme court of the United States, as may be implied from the scope of the opinions of judges Johnson and Story, as reported by Wheaton, it is with an irresistible awe that I approach it; for should our decision be adverse to the constitutionality, we virtually adjudge, that in this case, although it be a question arising under the constitution of the United States, the supreme court can exercise no appellate jurisdiction, inasmuch as we absolve ourselves from the obligation of sending up the record for their revision; and as so many other of the statutes of congress are dependent for their execution and utility upon the administration of them by state tribunals, the argument "ab inconvenienti" has great weight, and is entitled to the most serious consideration. The law of congress before us, was passed in the year 1789, the first session after the adoption of the constitution; it was proposed, debated and adjusted by a body of men, the chief and prominent characters of whom were themselves the erectors of our national institutions. It has been acceded to, and acted under, in this and every other state in the union; it has never been instrumental to any signal grievance, or complained of as a public or private evil; it has, on the contrary, been resorted to as a useful and salutary regulation; it has saved expense and trouble to

the general government without being burthensome to state officers, and there appears a degree of propriety and fitness, that as every individual state, and every officer thereof, is interested in, so they shall be rendered auxiliary to the execution of laws made for the benefit and protection of the whole. The law has obviated, on the part of the United States, the necessity of scattering at large a host of officers throughout the communities of the different states; it has kept them clear of creatures armed with authority, derived from an executive, foreign form, and not harmonizing with the state government, subject to regulation in their official capacities to which the people, amongst whom they may be placed to reside, would be unused and averse, and susceptible of being made the instruments of power whensoever it might be expedient for the general government to avail itself of engines calculated to propagate its opinions, and to uphold and enforce its measures; or, at least, to defeat by confounding the resort to legal remedy, in the heterogeneous process, or jarring and conflicting jurisdictions. But, notwithstanding all these considerations, I will proceed as concisely, and in as condensed a manner, as I am capable, to present my view of the subject. The national government appears to me to stand in relation to the states, as civil society does to the individuals composing it. Both consist of a congregation of surrendered or delegated rights; and in neither case can these conceded powers be enlarged, diminished or returned to the parties granting them, but by their own consent, collected in such manner, in the first case, as the constitution providing for its amendment should prescribe; and in the second, as the laws of the social compact should direct.

The several independent states have agreed, by the constitution, to invest the judicial power of the United States in one supreme court, and in such inferior tribunals as the congress may from time to time ordain and establish; and then the constitution goes on to define, what is the judicial power of the United States collectively, as a national government, as I understand it, in contradistinction to the judicial powers of all the states separately, viz:—The judicial power of the United States, shall extend to all cases in law and equity arising under

MARYLAND.

United States

v.
Almeida.

MARYLAND. the constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, and other public ministers; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and the citizens of another state, between citizens of different states, between citizens of the same state claiming lands under the grants of different states, and between a state, or the citizens thereof, and foreign states, citizens and subjects. From the word "all" being used in the first part of the clause, dropped in the middle, and again resumed, it has been inferred, that exclusive jurisdiction not in every case enumerated, was delegated to the United States. Be this as it may, the states, beyond all controversy, reserved to themselves some, if not all rights not expressly given away, and having done so, they unquestionably had the power and exercised it, of creating judicial tribunals for the protection of such of those rights, and the administration and exposition of laws passed in regard to them, as they might deem proper; and if they deemed it expedient to leave their citizens without tribunals, having authority to afford them remedies in certain cases, and especially those where the United States had clearly jurisdiction, if only concurrent, where exists the power of congress, under the constitution, to compel the states to create such courts, or what is there to prohibit the states from enjoying the exclusive use, for state purposes, of their own courts and civil officers, and of prescribing as a condition of the tenure of office, that they should, as the constitution of Maryland has done, exercise no office of profit or trust under the government of the United States? What rightful power has the congress, after the adoption of the constitution and the investment thereby of judicial power in the general government, to enlarge, diminish, or return any of its powers to the states? If it had a right to confer any power, what power has it not a right to confer, unless expressly prohibited by the letter of the constitution?—and state tribunals must thus be converted into courts of admiralty and maritime jurisdiction. In fact, if congress has the power of conferring on them the duty of arresting, of committing, hold-

United States
v.
Almeida.

ing to bail or discharging without it, all of which are judicial acts, because they imply an act of judgment, and are not mere ministerial duties, it must also possess the power of assigning to them that of trial, conviction and sentence to punishment. Surely it cannot be contended that such authority is derived from the clause that the judicial power of the United States shall be vested in a supreme court and in such inferior courts as the congress may, from time to time, ordain and establish, and that under this interpretation, state courts may, at the pleasure of congress, without their consent or knowledge, or the sanction of the state under which they act, be converted into United States courts; if such were the case, congress would have nothing more to do, in order to destroy a state judiciary, than to assign the judges duties under the general government, and as fast as the state of Maryland created courts, congress might prostrate them until its constitution shall be altered and its officers allowed to hold offices under the United States. To whom should we then look for the protection of reserved rights? The first section of the constitution of the United States is clearly prospective: it declares that the judicial power shall be vested in one supreme court, not in a court as it were already created, but to be created, not in inferior tribunals in existence, but such as congress shall from time to time, ordain and establish hereafter; evidently intending these courts to be United States courts, responsible and impeachable by the United States for neglect of duty or the abuse of power, and forming a constituent part of the judicial system of the United States. Again, if congress has power to return to the states judicial powers, or enlarge the power of state courts, why should it not have the power of returning to, or enlarging and diminishing the legislative and executive powers; and if it could assume such power as to all the states, what is to prohibit it from exercising it as to any one or more of them? And thus at once might be frustrated the wisdom and foresight of our fathers, in securing to the small states an equal representation in the senate of the United States with the large ones; by yielding to a majority of congress the power of imparting superiority and predominance to any one or more states, by returning to them sovereign, judi-

MARYLA'D

United States

v.

Almeida.

MARYLAND cial and executive powers conceded to the general government, whilst it withheld them from others. These may be termed extreme cases, but it must be observed, that if the occurrence of such cases had not been slighted and overlooked, many revolutions of governments would have been escaped, which have involved in them the servitude and wretchedness of millions. If congress has power to require of the state courts to take cognizance of any matters assigned or relinquished to the supreme and inferior courts of the United States, it surely is not limited as to the extent of this demand; and under such a construction, all the business of the general government might be imposed upon state tribunals, whose judges being thus subjected, it is easily comprehended would be compelled either to resign their seats upon the bench or to exact of the state governments, by whom they were employed, an increase of compensation commensurate with the enlargement of their official duties; and the general government, by these means, might be enabled to impose and exact a tax, of any one or more states, in a way unjust and unequal, and never contemplated by the genius of our government, or letter of the constitution. Besides, the constitution of the United States prescribes, that the judges shall hold their offices during good behaviour, and shall receive for their services a compensation, not to be diminished during their continuance in office. Now, the tenure by which state judges hold their offices, it is notorious, varies in almost every state, and, here particularly, it essentially differs from that provided by the constitution of the United States; and civil officers are expressly forbidden to hold any office of profit or trust under the general government; how, then, can the congress of the United States compel them to accept one, for which they shall receive a compensation, not to be diminished during their continuance in office? Again, the manner of their appointment is totally different. The constitution of the United States requires the judges to be appointed by the president and senate; can it, then, be seriously contended, that congress, by law can, not only ordain and establish judicial tribunals, convert to its own use state courts, some created since, others in existence before itself was in being, but that it should also forthwith pro-

United States
v.
Almeida.

ceed to the appointments of judges thereof, without the consent of the president, the senate, or the judges themselves. Certainly, such a doctrine asserts the power, and would have the inevitable consequence to absorb into the general government, all state sovereignty, and by thus appropriating and controlling state courts, indirectly to modify, regulate, abridge, invade or destroy the rights and privileges reserved to the states, for the protection of which they had organized their courts of justice. Have the states any where expressly, or by implication, delegated any such power to the general government? It has, however, been urged as an argument in support of this motion, that in many cases, the state courts and the United States courts, have a concurrent jurisdiction, and that, therefore, the judicial power does not exclusively belong to the supreme and other courts of the United States; and strength is attempted to be given to this idea, from the word "all" not being used throughout, but dropped, when controversies between the United States and any one state are provided for. If there can be any discrimination between the judicial power and all the judicial power, it may possibly have been, with a view of avoiding any expression that might be construed to take a jurisdiction from the state courts which they had before exercised, to wit, that of deciding claims for, and against the United States, under the old confederation, and which the constitution subsequently expressly reserves to them, that this variation of language was adopted. But if this proves any thing, it proves too much, (there being no denial, that the national government has power to punish offences against its own laws) for it rather implies, that where the word *all* is used, there is no concurrent jurisdiction, and that concurrent jurisdiction existed only in cases where the state courts had a previous cognizance: Besides, if the constitution, with a view to the doctrine of reserved rights, gave or recognized a concurrent jurisdiction, there could be no necessity for the law of congress to give it; and if the state courts had it not before, and did not get it from the constitution according to the principles I have endeavoured to enforce, they could not obtain it by a law of congress. Whatever doubt, therefore, there may have been to the jurisdiction, in all cases,

MARYLA'D.

United States

v.

Almeida.

MARYLA'D. with respect to the criminal law of the United States, I can entertain none ; for, it is obvious that previous to the constitution, there could be no criminal jurisdiction of offences against the United States any where ; and, if the state courts could subsequently have it, they must derive it from the constitution itself. But this no where appears on the face of the instrument ; and, inasmuch as the legislative, executive and judicial powers of the state governments, consists in the reservation of rights not delegated, and cannot in any degree be composed of concessions from the national government, which is itself made up of what the states had parted with, it would be, according to my apprehension, too great an incongruity to construe the right of conferring jurisdiction to be vested by the constitution in congress ; and it cannot be too constantly borne in remembrance by the civilian and statesman, that if congress could enlarge or diminish the power of state authorities, it would necessarily follow, that our national government would present the singular anomaly of one co-ordinate branch of a government possessing, as a component part of it, the inherent constitutional means, not only of its own dissolution, but that of undermining the basis of the whole fabric in the surrender, without the consent of the parties to the contract, who must be either the states or the people, of legislative, judicial and executive functions.

United States
v.
Almedia.

Upon the whole, it appears to me, that every cotemporaneous exposition of the views and considerations of the framers of the constitution, all traditional information of their conferences, and the opinion of enlightened statesmen who have before and since discussed it, carry with them a weight too impressive to be resisted ; and that they all concur in converging to the position, that every exercise of control over, or interference with state authorities, on the part of the United States, where the right is not explicitly granted, has a tendency to convert our confederative republic into a consolidated government ; and that unless such constructions are guarded against in time, at some day, a popular and ambitious executive might become the "architect of ruin" of the liberties of the people, by attaining a sufficient ascendancy to contract or dilate state powers according to circumstances ; to convert independent sovereignties.

into vice royalties, subservient to his mandates; and, in fine, to reduce a state, as it relates to us, into a mere "imperium in imperio," and possessing no more distinct and separate rights than the mayor and city council of a city could exercise in opposition to the legislature, judiciary and executive of a whole state; and although it may be appositely said, that state governments, as regards the national government, ought not to be considered as sovereign powers foreign to each other; that they are all parts of the same whole, and that as the people of the states are the people of the United States, the same policy, laws, and process may and ought to pervade and regulate the whole empire, as the same blood which flows into and nourishes the heart, runs through and invigorates every artery and fibre of the body; yet to my mind, the uniformity of a constellation is more illustrative, in which the national sovereignty, whilst performing its evolutions, is revolved round by the states, on their own axis, and in their own orbits, and if, in departing from its course, it should approach to concussion with its satellites, they would be jostled and obtruded from their spheres, whilst its own functions would be obstructed, and the order and conformity of the whole system deranged and destroyed.

MARYLAND.
United States
v.
Almeida.

I am of opinion, therefore, whatever doubt may exist as to the extent of jurisdiction common to state and United States' courts in civil cases, that state authorities cannot act in any kind of prosecution for offences against the laws of congress.

GENERAL COURT.

VIRGINIA, OCTOBER, 1813.

Commonwealth }
v. } ROBBERY OF THE MAIL.
John Feely. }

The prisoner was charged in an indictment in the following words, that "he the said John Feely, with force

Jurisdiction
of state courts.

VIRGINIA,
1813.

Commonwealth

v.
Feely.

and arms, feloniously did steal, take, and carry away out of the mail of the United States, three packages, containing articles of value; one directed to Philadelphia, one to Pennsylvania, and one northward; which packages had been delivered to Gardner I. Grant, (who was mail carrier,) to carry them from Wythe court house, to Montgomery court house, contrary to the form of the act of congress of the United States, in such case made and provided, and against the peace and dignity of the commonwealth."

The prisoner was tried on this indictment, and found guilty by the jury.

He moved in arrest of judgment for the following reason: "because he says, that the offence in the indictment being created by an act of congress, this court being a state court, has not jurisdiction thereof."

The case was adjourned to the general court, who met on the 11th of November 1813. Present—Judges White, Stuart, Brockenbrough, Semple, Allen, Randolph, Dabney, and Daniel. The court entered the following judgment upon their records. "The Court doth unanimously decide, that as the offence described in the indictment in this case, is created by an act of congress, the said superior court being a state court, hath not jurisdiction of the offence."

GENERAL COURT.

VIRGINIA, NOVEMBER, 1791.

The Commonwealth
v.
John Crane, the younger. } **MURDER.**

The prisoner being in his field with his reapers, was informed (3 o'clock, P.M.) that Campbell's reapers in an adjoin-

The prisoner was indicted for the murder of Abraham Van Horn. The jury found a special verdict, in the following words:

We, of the jury, find, that about three o'clock, on the fourth of July, 1791, John Crane, the prisoner at the bar, was informed by his reapers, that one of Camp-

bell's reapers had sent a challenge to his. That in consequence of this supposed challenge, the said John Crane went with others out of his own field, into the field of the said Campbell, which was adjoining to that of Crane's, and that the said Crane did make use of threatening language, such as he could whip any man in the field, meaning Campbell's reapers, amongst which was Abraham Van Horn: but after some altercation, we find all parties appear to be reconciled. But, before said Crane left the field, another dispute arose, in which Crane challenged them to fight, man for man, which Campbell's party agreed to do; of which number the said Abraham Van Horn was one. When the parties came near, they parleyed and disputed for some time; the issue of which was that the prisoner at the bar swore that if he fought any man that day, he would let out his guts; and likewise, that he would fight Joseph Van Horn the next morning for ten dollars, which the said Abraham Van Horn was to bet him.

The prisoner at the bar leaving Campbell's field, after some time a certain John Dawkins, one of Crane's reapers, suspected some insult given by Campbell's party, and going to fight any one that would insult him. The prisoner at the bar observing this, requested the said Dawkins to get him a club, and he would take his knife; which knife he took out of his pocket, declaring they could clear their way through the whole of Campbell's party; upon which the said Dawkins desisted from prosecuting his intentions, and likewise the prisoner at the bar. We find that between sunset and dark, the said Abraham Van Horn, with several others, were passing through the field of John Crane, the prisoner at the bar, to confirm a bet, which was to ensue the next morning; and also making a noise and singing, which the said out his guts, and that he would fight Abraham Van Horn, one of Campbell's men, (who was present,) the next morning for ten dollars, telling one of his men to get a club. and he would take his knife, and they would clear their way through the whole of Campbell's men. Each party for the present desisted.

Between sun-down and dark, Abraham Van Horn, with others, was passing through the prisoner's field, to confirm the bet, singing and making a noise. He ordered them out, and said he would blow them through; and they went out. He called for his gun, which was refused, and then for his knife, and pursued them to the fence; and there exclaimed to Abraham Van Horn, you have used me ill, and I'll be damned if I don't have satisfaction. After some intemperate words between him and Van Horn, Van Horn took off his shirt, and they attempted to get at each other through the fence. The prisoner struck Merchant, one of Campbell's men, who struck back, and the prisoner and Van Horn clinched, and the prisoner was thrown. Presently Van Horn exclaimed, enough; that his guts were cut out. The wounds were mortal, and Van Horn died.—Held murder.

VIRGINIA,
Nov. 1791.

Com'wealth
v.
Crane,

ing field,) had sent a challenge to his. He went out of his own field into Campbell's, and used threatening language, but finally all parties appeared to be reconciled. Before he left the field a dispute again took place, and he challenged Campbell's men to fight them man for man; which was accepted. When the parties approached each other, he swore if he fought any man that day, he would let out his guts, and that he would fight Abraham Van Horn, one of Campbell's men, (who was present,) the next morning for ten dollars, telling one of his men to get a club. and he would take his knife, and they would clear their way through the whole of Campbell's men. Each party for the present desisted.

VIRGINIA,
Nov. 1791.

Com'wealth
v.
Crane.

Dawkins conceived was an insult to the prisoner at the bar and his party. Thereupon Dawkins called out that he could whip Joseph Van Horn. Joseph Van Horn replied, it would be no credit to him if he did, as he was a larger man; upon which the prisoner at the bar came out, and ordered them out of his field, or he would blow them through; upon which they immediately quitted the field. He then called for his gun, which was refused by his wife: he then called for his knife, and pursued them to the fence, exclaiming, "Van Horn, you have used me ill, and I'll be damned if I don't have satisfaction." Then the said Abraham Van Horn replied, not more so than you have used me: the prisoner then requested the said Abraham Van Horn to come over the fence and fight him; the said Abraham Van Horn made answer, that he, the said prisoner at the bar, would use a knife or razor: the said prisoner at the bar replied, come over the fence and I will give a fair fight. The wife of the said prisoner at the bar came down crying out, "Mr. Crane, I am surprised you should demean yourself to fight with such a set of negrofied puppies." By this time the prisoner at the bar, and the said Abraham Van Horn, were much irritated at each other; the said Abraham Van Horn and Isaac Merchant, one of Campbell's reapers, had their shirts stripped off, which the prisoner at the bar had not. The prisoner at the bar, and the said Abraham Van Horn attempted to get at each other across the fence, but were prevented by John Dawkins: then the said prisoner struck at Merchant, who struck the said prisoner at the bar, and turned him round, who immediately joined in combat with the said Abraham Van Horn. We find in the combat that the said Abraham Van Horn threw the prisoner at the bar on the ground; and kept him there for some time: at length, the prisoner at the bar seemed to get the advantage of the said Abraham Van Horn; at which time the said Abraham Van Horn cried enough, and said his guts were cut out. We do find that the said Abraham Van Horn did receive several wounds with a knife, or some sharp instrument; of which wounds the said Abraham Van Horn died; and that the said wounds were given by the prisoner at the bar. Upon the whole matter the jury pray the advice of the court; and if the court,

should be of opinion that the prisoner is guilty of murder, then we of the jury do find that the prisoner is guilty of murder: and if the court shall be of opinion that the prisoner is not guilty of murder, but of manslaughter, then we the jury do find the prisoner not guilty of murder, but guilty of manslaughter.

VIRGINIA,
Nov. 1791.

Com'wealth
v.
Crane.

The District Court not being advised what judgment to give on this verdict, adjourned the question, with the consent of the prisoner, to the general court for difficulty.

On the 21st of Nov. 1791, the general court, consisting of Judges Prentis, Tyler, Henry, Jones, Roane and Nelson, entered the following judgment: "This day came as well the attorney general, as the counsel for the said Crane; and thereupon the question of law, arising upon the special verdict in the transcript of the record of the said case mentioned, to wit, whether the said Crane be guilty of murder or manslaughter, being argued, it is the opinion of the court, that the said Crane is guilty of murder, which is to be certified to the district court of Winchester."

See ante,
vol. 1.

NOTE. If the prisoner be assaulted and beaten, and runs to his house an hundred yards or more, and returns in three or four minutes with a knife, and stabs the assailant, it is manslaughter. *State v. Norris*, 1 Hayw. 429. But a sudden transport of passion shall never make the killing of a person manslaughter, unless it deprived the party of his reasoning faculties from the time when it was raised, until the giving of the mortal wound. *Rex v. Oneby*, 2 Ld. Raym. 1485. Stra. 766.

PORTLAND, (MAINE,) JUNE, 1824.

<i>The State</i>	}	LIBEL.
v.		
<i>Nathaniel G. Jewett.</i>		

Present—*Smith*, Justice.

On Friday and Saturday last, an indictment for a libel was tried before the Court of Common Pleas in this relation to libels see Buckingham's case, ante p. 428. and vol. 1. p. 354. It is not the province of the jury, (notwithstanding they are judges of the law and fact) to decide what is proper evidence; it is the privilege of the court.

PORTLAND,
June, 1824.

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The State
v.
Jewett.

town, Judge Smith on the bench. The complainant was Abijah W. Thayer, printer of the Portland Statesman ; and the defendant Mr. Nathaniel G. Jewett. The indictment was founded on an address to the public, signed by N. G. Jewett, and published in the Argus, on the second of December last. This address was one of several communications published about that time, alternately by Thayer and Jewett, relative to the publication of a directory of the town of Portland. The paragraphs introduced into the indictment, and considered by the grand jury as libellous, were two, as follows : " I (meaning said Jewett) never in my life purchased a printing establishment, packed up all the printing utensils within my reach, between two days made my escape from an honest and unsuspecting creditor, and retreated to the sea-board, with a view of committing my fortunes to the chances of a voyage ; but ere I had accomplished my design, was pursued and detected by the vigilance of that creditor, and compelled ignominiously to acknowledge my villanous conduct." This paragraph the grand jury explained to mean, that the said Thayer did purchase a printing establishment, &c. &c. The other paragraph, as rendered in the indictment, was as follows : " I shall here cease, and no longer invite public attention to a barren waste, (meaning said Thayer,) where nothing but baseness and perfidy luxuriate, and to a character (meaning said Thayer,) from the contemplation of which every honest man must turn with emotions of commingled pity and disgust."

The indictment having been read, the attorney for the government explained to the jury the law of libels generally, and read from various authorities, showing what constitutes a libel, and urging reasons why the laws should be enforced. It was admitted, he said, on the part of the defendant, that the piece on which the indictment was founded was written by him, and the only question, therefore, for the consideration of the jury, would be whether the piece was libellous.

Mr. *Deblois* opened the defence. He considered it a matter of regret, that this affair, trifling as it was in the outset should ever have been suffered to acquire such an importance as was now attached to it, or that it should ever have been obtruded upon the public notice at all. He briefly states the origin of the contest between

Thayer and Jewett; that they had agreed to publish in company a directory of the town of Portland, and share the profits between them; that some misunderstanding arose as to the terms of agreement; they separated, and each published a separate directory. He considered it the duty of the opening counsel, to give a general view of the case; and explain the nature of the testimony which would be adduced, without stopping to comment upon it as he passed. It would be proved to the jury, he said, that Thayer was the first aggressor; that he commenced the warfare, and made the attack on Jewett. From pieces which would be exhibited to the jury, they would be convinced that Jewett acted only on the defensive, and that Thayer's publications against him were infinitely more gross and unjustifiable than his against Thayer. Here he was interrupted by the attorney for government, who objected to the kind of evidence proposed to be adduced; he wished the management of the cause to be kept within legal bounds. Other publications in the newspapers could have no bearing upon the case now in question; one libel could never be adduced as a justification for another, and, whatever Thayer might have published, it would not alter the character of the piece on which the present indictment was founded. Upon this, a long conversation arose between the court and General Fessenden, counsel for the defendant. Mr Fessenden claimed the right to read to the jury all the pieces touching the subject in question, published by Thayer as well as Jewett. The court inquired what was expected to be proved by them. The counsel for the defendant stated, that they would go to show that the language applied to Thayer in the first charge in the indictment, was not correctly applied. Thayer had published various charges against Jewett, and the language of Jewett, which had been applied by innuendo to Thayer, was a mere negation, and applied in reality, as it did literally, to himself. The court, after examining the articles referred to, decided that they could not bear such an inference, and objected to their being read to the jury. The counsel for the defendant then claimed the privilege of giving the truth in evidence with respect to the second charge in the indictment, and proposed to read the communications for that purpose. But the court decided that this was not one

PORTLAND,
June, 1894.

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The State
v.
Jewett.

PORTLAND, of the cases contemplated by the constitution, where the truth may be given in evidence ; that provision of the constitution referred to libels against public officers and candidates for public office. The counsel for the defendant then claimed another authority for presenting these communications to the jury. In cases of libel, the constitution of this state has made the jury the judges both of the law and the fact ; and it was, therefore, their province to decide whether the testimony was proper to come before them or not. To this the court also objected. There must be some one to judge whether testimony was relevant to the case or not, otherwise testimony might be offered without end ; and the court must, from the necessity of the case, decide what evidence was proper to go to the jury ; and after the evidence was before them, it would belong to the jury to judge both the law and the fact. So the several communications were finally barred from being adduced as evidence, and the counsel for the defendant made his argument from the article alone, on which the indictment was founded.

PORTLAND,
June, 1834.

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The State
v.
Jewett.

With respect to the first charge, the counsel for the defendant contended that the inuendo by which the language was applied to Thayer, was not made out ; that Jewett had made the declaration concerning himself, and that it was a forced construction to apply it to Thayer. With respect to the second charge, if the jury should think that the language did apply to Thayer, he should contend for the right of giving the truth in evidence in justification of the defendant. In this free country he could never acknowledge the correctness of the doctrine, "the greater the truth, the greater the libel." The constitution of this state had wisely provided, that in all actions for libel, where the matter published was proper for public information, the truth of the case might be given in evidence. The publisher of a newspaper was, in a certain sense, a public officer ; the community was deeply interested in his character and conduct, and any testimony of facts concerning his character and principles, was proper for public information. If the language in the second charge of the indictment did apply to Thayer, Jewett had charged him with being "a character, from the contemplation of which every honest

man must turn with emotions of commingled pity and disgust." This charge, he believed, was strictly true and just, and he should have been able to prove it satisfactorily to the jury, had he been permitted to bring forward the testimony which he proposed. No candid person could examine the numbers of the Statesman for two years past without admitting that every honest man must turn from the publisher with emotions of pity and disgust. Scarcely a number of that paper could be found, which did not contain most gross and scandalous libels upon some of the most respectable characters in the state. It was full of the vilest abuse, both upon individuals and the government. And although he was not allowed to lay the papers before the jury as evidence, he trusted that the gentlemen of the jury had already sufficient knowledge of the general character of the paper to satisfy them that every honest man must turn from the publisher with pity and disgust; that they themselves would turn from him with pity and disgust; and if so, he trusted they would by no means consent to punish Jewett for having stated what he believed to be true, and what it was certainly important for the community to know.

The attorney for government replied, in detail, to the argument of the counsel for the defendant. He considered it perfectly obvious, that the language of the first charge in the indictment did apply to Thayer; it would so appear to the common sense of every reader, and so the jury would be bound to consider it. As to the second charge, whether it were true or false, was not material. It mattered not how many libels Thayer had published; if this was a libel against him, it was an offence against the state, and as such ought to be punished.

In charging the jury, the Judge stated his impressions of the law, and directed the jury to give them what weight they, in their discretion, might think proper, the constitution having made them the judges both of the law and the fact.

The jury retired about ten o'clock on Saturday, and were out till after four, when they came in and stated *that they were unable to agree*. Upon which they were discharged, and the cause continued to the next term.

PORTLAND,
June, 1824.

The State
v.
Jewett.

CIRCUIT COURT, U. S.

CORYDON, Nov. 3, 1818.

*In the Matter of Susan, a Woman of Colour, and
Fugitive Slave.*

The 4th art.
sec. 2. of the
constitution
confers power
upon con-
gress, and the
law of con-
gress in pur-
suance of it in
relation to fu-
gitives, is
constitution-
al, and is ex-
clusive of
state laws as
to the objects
they embrace.

Benjamin Park, J.—Susan, a person of colour, being brought before me, upon a warrant issued upon the complaint of her master John L. Chasteen, a citizen of the state of Kentucky, who claims her as a fugitive from labour;—it appeared that cognizance of the case had been taken under a law of this state, which provides, that a non-resident, having a claim to the service of any person in this state, shall procure a warrant from a judge, or a justice of the peace, who being satisfied of the validity of the claim, shall certify the case to the next term of the circuit court for the county, where a trial by jury shall be had in the ordinary mode; and upon verdict and judgment being obtained against the servant, the court shall grant a certificate, authorizing the claimant to remove the servant out of the state. That the claim of Chasteen having been asserted under this law, the case was certified to the circuit court, for the county of Jefferson, and being dismissed by the claimant, a bill in equity was filed, and an injunction obtained against him, for the purpose of investigating the claim of the girl to her freedom.—The claim, however, being brought before me, the case pending before the state court was dismissed, and a motion submitted for the dismissal of the warrant, upon the ground,

“That the 3d clause of the 2d section of the 4th article of the constitution of the United States, confers no authority on congress on the subject of fugitive slaves; and, therefore, that the act of congress (Feb. 12, 1792) is unconstitutional.”

But admitting the constitutionality of that law, it was contended that the several states have an authority, concurrent with congress, to legislate on this subject; and therefore, that any procedure under the law of this state,

(December 30, 1816,) already mentioned, operates to the exclusion of any authority derived from the act of congress. CORYDON,
Nov. 3, 1818.

Prior to the adoption of the constitution of the United States, the inhabitants of the states where slavery prevailed, were exposed to so many inconveniences from the escaping of their slaves into other states, where slavery was not tolerated, from the different views entertained of the subject, it was thought unnecessary or improper to aid in their restoration; and in the states, where coloured persons were free, persons escaping from the service of their masters, became emancipated by their laws. To correct these abuses, prevent collisions between the several states, to secure the enjoyment of property according to their laws, respectively, and to enable the owners of slaves, fleeing from their service, to reclaim them, the constitution provides, that no person held to labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on the claim of the party to whom such service or labour may be due; and in conformity to this provision of the constitution, congress accordingly enacted that any person held to service or labour, in any state, according to the laws thereof, escaping into another state, may be seized by the person to whom such service or labour is due, and taken before a judge of the United States, or any magistrate of a county, &c.; who, upon proof, to his satisfaction, that the person so seized, doth, under the laws of the state from which he or she fled, owe service or labour to the claimant, shall give a certificate thereof, and which shall be a sufficient warrant to remove back the fugitive to the state from which he or she escaped.

In the Matter of Susan, a woman of colour, and fugitive slave.

This case has probably furnished the first occasion on which the validity of this law has been questioned, which is cited by judge Tucker in his commentary on the constitution of the United States (Tucker's Black. 366.) and by the supreme court of the state of New York, (in, I believe, *Glen. v. Hodges*, 9 Johns. Rep. 67.) with approbation, and which has been recognized in many cases before the judges and courts of this country; no reason has been suggested to influence a deviation from this current of

CORYDON, authority; and the case, as regards this point, is considered clear of doubt or difficulty.
Nov. 3, 1818.

In the Matter of Susan, a woman of colour, and fugitive slave.

Before the passage of the act of congress, owners of slaves escaping into other states must have resorted to the laws of these states for the recovery of their property. They had no other means of redress; but when, in conformity to the constitutional provision, congress legislated and provided a remedy commensurate with the object in view, it superseded any state regulation then existing, or that might thereafter be adopted. The idea of another concurrent power in the federal and state governments appears to have been carried too far in the argument, and if admitted, would be pregnant with the greatest mischief, and the source of perpetual collisions between the states and the general government. The cases of taxation, &c. are not apposite. A concurrent power may be exerted, on the same subject, for different purposes, but not for the attainment of the same end. If laws of the same tenor and effect are enacted, one must be useless; but if they differ in the remedy, and in the mode of obtaining it, their relative authority must be determined from a recurrence to the source from whence they originated. In the formation of the constitution of the United States, the states parted with this authority, and devolved it upon the general government, and it is a privilege secured to the people of the states respectively, to seek redress before the tribunals, and in the mode designated by congress.

By the law of congress, a judge, or magistrate, is competent to decide, finally, the service of the owner; but by the law of the state, if satisfied of the validity of the claim, he is to certify the case to the circuit court. The former case is to be determined in a summary way; according to the latter, by a court aided by a jury: by the former, there is a discretionary power as to the reception of evidence in support of the claim; by the latter, the cause must be conducted as is usual in suits at common law, and it is unnecessary to inquire whether one or the other is best calculated to promote the ends of justice. It is sufficient that congress have prescribed the mode, and the motion must, therefore, be overruled.

CIRCUIT COURT. U. S.

CHARLESTON, MARCH, 1819.

Consul of Spain

v.

The Schr. Conception and cargo.

} DECREE.

Johnson, J. — This vessel and cargo are clearly Spanish property, and the Corvette La Union, by which she was captured, was a commissioned cruiser of the republican or revolted province, (for names prove nothing) of Buenos Ayres. The prize put into this port in distress; was labelled by the Spanish consul in behalf of the Spanish owners, and by the decree of the district court, ordered to be restored, on two grounds: 1st. That the courts of this government cannot recognize the commission under Buenos Ayres. 2d. That the capturing vessel had recruited men while lying in the mouth of the Mississippi in the month of April last, which men were on board at the time of this capture. As to the second ground, I cannot think that the evidence was such as sanctioned the decree of the district court; for besides that the fact is but feebly established by the witnesses who swear to it, when their testimony is compared with each other, and with that of the officers, as the only witness who testifies to the national character of the four men said to have been enlisted, proves them to have been foreigners, not Americans, and to have come on board the capturing vessels to enter. The case has never been included in any of the penal laws passed by congress on this subject, nor have foreign governments any ground for claiming from the United States that such a case should have been included. The fact of illegal equipment, therefore, I consider as unsubstantiated. With regard to the first and principal ground on which the decree is founded, I am of opinion that it is one of more delicacy than real difficulty.

To have dismissed the libel, it was not necessary to recognize the independence of Buenos Ayres as one of the family of nations. The indisputable fact known to all the world, and recognized by our own executive, in many official communications, of the existence of open,

Courts exercising jurisdiction of international law, may deduce the fact of national independence from history, and an explicit official recognition is not necessary

CHARLES-
TON.
March, 1819.

Consul of
Spain
v.

The Schooner
Conception
and cargo.

solemn war between Spain and an extensive and powerful colony, is enough to impose on us, as a nation, the duties of neutrality. The colony asserts, the social compact is violated by the parent state, and the state of dependence or allegiance no longer existing. On this question an appeal is made to the God of armies, and no inferior tribunal ought to interfere. The colony claims from us no acknowledgment of her independence; she only demands of us to leave her in possession of what she can win by arms. Spain, unable to rescue by force, solicits our aid to seize, in violation of the rights of hospitality, the property that has been forced into our harbours: our duty is to lend our aid to neither, but to leave them as we find them, rigidly adhering to the duties of neutrality. This is not a piratical capture, and therefore not a case within the provisions of our treaty with Spain. It is a seizure in the exercise of the rights of war, not by one who wages war against the human race, but one who has singled out Spain for the sole antagonist. All seizures of property within our limits, we are bound by that treaty to prevent, but the duty to restore, is confined solely to the case of rescue from those whom we can recognize as pirates. In the case of Palmer and others, in the supreme court, the principles laid down by the chief justice excluded all idea that this was a piratical capture. It was then a seizure *jure belli*, and the rights of war are necessarily commensurate with the power of maintaining it openly and solemnly, more especially upon the high seas; the jurisdiction of which is not susceptible of that demarkation and appropriation which takes place on the land. This conflict has long been carried on between the colony and parent state. The event is at least doubtful. It is on both sides an assertion of a supposed existing right, and neither can claim of a nation to whom their disputes are immaterial any act of interference which may involve it in a contest with the victor. Much has been said, and some cases and opinions cited to show that this court cannot recognize the independence of a revolted colony, until that recognition shall have proceeded from our own government or the parent state. There was a time when this country negotiated and fought to maintain a different doctrine; and it will be recollected that, in the opinion

before expressed, I have not thought it necessary, in this case, to assert a different doctrine.

But as the doctrine in this point is now where laid down fully to my satisfaction, I will embrace this opportunity to state briefly my views of the subject. The recognition of our own government, whatever be the state of fact, removes all question of doubt, and our courts must consider the governments thus recognized, as independent; and so the recognition of the parent state actually produces a state of independence. But courts exercising jurisdiction of international law, may often be called upon to deduce the fact of national independence from history, evidence, or public notoriety, where there has been no formal public recognition. The actual possession and long exercise of all the attributes of a state of independence, may be legally resorted to, without giving just cause of umbrage to a nation that does not possess the power to subjugate a revolted colony. There exists many nations at this day, which may claim, of courts of international law, all the rights of independent nations, and may be judicially recognized as such, notwithstanding no act of government has acknowledged them in that capacity; and some which hold it altogether by the sword, which acquires it when the parent state relinquishes the conflict, or plainly evinces an inability to pursue it with success. I should say her recognition in words is unnecessary, and should our own government ever exercise, towards a revolted colony, those acts of comity or communication, which are known and practiced in the intercourse of nations, I should consider all positive explicit recognition as unnecessary to support the claims of such states to a judicial recognition. The establishment of many such facts would, in my estimation, supersede the necessity of explicit official recognition. Our own courts have in several instances been called on to express opinions on this subject; and although the opinions which they have expressed, may, in their language, appear very general, yet that language has always been used in reference to cases in which the conflict was actually kept up. In the case of *Palmer*, the chief justice has expressly limited his observations to such a case, *flagrante bello*; it is a question of policy; there is an actual absence of such evidence as a court of justice can act

CHARLES-
TON,
March, 1819.

Consul of
Spain
v.
The schooner
Conception
and cargo.

CHARLES-
TON,
March, 1819.

Consul of
Spain
v.

The schooner
Conception
and cargo.

upon, and the question is altogether one on which the executive or legislative power is called to act. Decree reversed, property restored, and libel dismissed with costs.

The decree of judge JOHNSON, in the case of the Spanish schooner *Conception*, was appealed to the supreme court at Washington.

CIRCUIT COURT, U. S.

CHARLESTON, MAY, 1819.

The Maria Josepha, and cargo.—DECREE.

Salvage.

Questions of salvage are always questions of the most disagreeable kind. In vain the mind looks for relief, in its anxiety to do justice, by seeking the aid of fixed rules and principles. Such questions are addressed exclusively to discretion, and that discretion must move in a range to which there are no defined limits. This is attended with another embarrassing circumstance. It is impossible to separate the question of salvage from that which must finally dispose of the residue of this vessel and cargo. The same rule cannot be applied indifferently to both parties claimants. If the residue ought to be restored to the Spanish claimant, then no salvage can be demanded; if the treaty applies to the case, or if it does not apply, then much higher salvage ought to be paid than if it be adjudged to the captor. The principal question in the case, then, is forced upon me before I can dispose of that salvage; and here I cannot hesitate on the decision that must be made. The law of nations requires of the United States the observation of strict neutrality between the belligerents. *Flagrante bello*, no neutral nation is bound to pursue a course of conduct that may, ultimately, embroil it with the victor. We found the property in possession of one of the belligerents, and we are bound to leave it there. It is enough for us that we see a state of open war existing between two powers who are able to maintain it. The

question of right is with the God of armies. This is no recognition of the independence of Buenos Ayres; it is the recognition of a *fact* known to all the world, and admitted by the claimant himself; that of a state of open war between Spain and one of her colonies. This is the most solemn and notorious act by which nations can exhibit their independence to the rest of the world; and, whilst the struggle continues, other nations are not at liberty to distinguish between fact and right. Under these impressions, I award one fifth of the nett proceeds to the libellant; convinced that, had the captors been consulted at the time the vessel was taken charge of, they would have freely given that proportion to secure the rest; and that the libellants ought to be satisfied with eight thousand dollars for the service rendered.

There is another point on which I feel myself called on to make a remark: that is, the effect of the treaty between Spain and the United States. The sixth article has no bearing on the case. The object of that article is the protection of the vessels or effects of Spanish subjects from seizure, at the time of their being within our jurisdiction. Nor does the case come under the 9th article, since, in whatever light Spain may think proper to consider the cruisers of her enemy, they are *not pirates* in the view of other nations; and as to the second section of the 14th article, it makes no provision for the restitution of property captured by citizens who have accepted commissions to cruise against Spain. The provisions are, that no citizen shall accept such a commission, and that he who accepts such a commission shall be punished as a pirate. In a government of laws, every thing has been done which good faith required to be done. Laws have been passed, and our courts are open for the punishment of such as accept of commissions under the enemy of Spain. But information must be lodged and evidence produced, before it can be required of the courts of justice to punish those offenders. For any thing farther Spain must depend upon the vigilance, activity and intelligence of her agents; and in no case is it, or can it be made, an addition to the punishment of such offenders, that the property shall be restored, unless the United States may be made liable for indemnity; for when the capture is made, the property

CHARLES-
TON,
May, 1819.

The Maria
Josepha and
cargo.

CHARLES-
TON,
May, 1819.

The Maria
Josepha and
cargo.

is vested in the government that grants the commission. It is the seizure of the state, and not of the individuals.

In the case before us, there is no evidence that the San Martin privateer was fitted out in the U. States. She has, indeed, very improperly, recruited her crew within our limits; and every individual concerned in that transaction will be punished, if prosecuted. But all the world knows that the arbitrary exertion of power is unknown to the genius of our constitution, and all that any state can expect of the United States is, that adequate laws should be passed to punish and prevent the commission of such acts. When acts are done in evasion of those laws, unless the government can be charged with winking at those evasions, it is not liable to indemnify Spain for such captures; and our courts of justice cannot, on that ground, violate the obligation of neutrality by seizing and restoring prizes that have been made by either party.

[Signed]

WM. JOHNSON.

DISTRICT OF DELAWARE, 1818.

<i>The United States of America</i>	} LIBEL.
v.	
<i>The sloop Pitt, her tackle, &c.</i>	

Libel for entering a port of the United States, against the provisions of an act of congress, entitled, "an act concerning navigation," passed on 18th April, 1818. Process returnable at Dover, 16th November, 1818.

Construction
of the act en-
titled an act
concerning
navigation,
passed April,
18th, 1818.

<i>The same</i>	} LIBEL FOR SAME CAUSE, &c.
v.	
<i>The goods, wares and merchandize laden on board the sloop Pitt.</i>	

These cases on the preliminary question of the right of the claimants to a delivery of the vessel and cargo on stipulated bonds, were argued before Fisher, district judge, by Mr. Read, district attorney, on the part of the

United States, and by Mr. Rodney, on the part of the claimants. DELAWARE,
1818.

As the judge briefly recites the arguments of counsel, in the opinion here given, they are omitted in their proper place. United States
v.
The sloop Pitt,
her tackle, &c.

Fisher, district judge.—The case now before this court arises on two libels filed on the part of the United States against the sloop Pitt, (a British bottom) her tackle, apparel and furniture; and also against her cargo, consisting of 46,000*lbs.* of cocoa, a small number of raw hides, and seventy sticks or pieces of fustic. These libels are instituted upon an act of congress of the 18th of April last, entitled "an act concerning navigation." The act was passed with a view to exclude from the country, after the 30th of September last, all vessels owned by British subjects arriving from a colony which, by the British navigation laws, is closed against vessels owned by citizens of the United States. In case of its violation, the act inflicts a forfeiture of vessel and cargo.

In these cases, claims have been put in by Messrs. Lewis, Haven and Co. merchants of Philadelphia, the consignees of the sloop and cargo against which the prosecutions are instituted. A preliminary question, of great importance, is submitted to the decision of this court, on a motion made by the claimants' counsel, praying an order for the delivery of the vessel and cargo, on bonds for their appraised value.—To me it is a subject of regret, that this question has not arisen in some other district, and been decided by a judge to whose opinion the utmost deference would have been paid. As, however, this has not occurred, I must tread the unbeaten path, and dispose of the question to the best of my ability and judgment.

It is contended, on the part of the United States, that if the property in the present instance be delivered, the spirit of the law, which goes to exclude British bottoms arriving from prohibited ports, will be effectually defeated, that the defective appraisements of the property will be an encouragement to vessels of this description to enter our ports, and that thus the navigation act will be set at defiance, and become a dead letter; that if the property be perishable, which is admitted in the present

DELAWARE,
1818.

United States

v.
The sloop Pitt,
her tackle, &c.

case, a sale of it ought to be ordered by this court, and the proceeds of such sale should be retained in court *in usum jus habentis*; that the cases of delivery heretofore allowed by the practice of this court, were between the United States and their revenue officers, and our own citizens, and are distinguishable from the prosecutions which may arise under the navigation act, framed as it is, to shut our ports effectually against those British colonies which our vessels are not permitted to enter, by the laws of trade of the British government.

The argument on the part of the claimants is, that it would be against equity to enforce a sale of property, which may have arrived innocently in our ports; that such a course would be presuming an intention to violate our law, when in fact no such intention had actually existed; that the practice of this court has heretofore been in accordance with the claimants' motion for a delivery of the property, and in cases, too, of goods prohibited by our restrictive laws, and not dutiable under any statute of congress; that the goods in the present case are dutiable, provided they do not arrive from ports prohibited to our citizens by the ordinary laws of navigation of the British government; and that the fourth section of the act, on which the present libels are founded, recognizes the provisions and proceedings of the revenue laws of the United States, from the inception to the close of the prosecutions, which may be instituted under it.

In the case under consideration we are exercising the powers of a court of admiralty on the *instance* side of it, which generally, and, perhaps, always, proceeds *in rem*. We are now in a course of proceeding against a thing that is prohibited from entering our ports, by our navigation act. The confiscation or restoration of this *rem* or thing, will eventually be the subject of our consideration and decree, when the case shall be heard upon its merits. The question at present, therefore, is, shall we receive in court a substitute for this thing, or shall we retain and order it for sale, for the use of the party, in whom the right may ultimately be decided?

It was the practice of this court, and of all the district courts of the United States, during the late war, to deliver vessels and cargoes on stipulation bonds, or on

the claimant giving what is called in the books upon admiralty practice, a *fide jussory caution*. The Delaware district led the way to this practice, by the introductory decree in the case of the Good-Friends, Stephen Girard, claimant. The decree in that case became the law of the country (in prosecutions under the restrictive laws) by its adoption in every district of the union. There was nothing to be found in our restrictive laws, either favouring or disallowing such a course; but it was viewed as being in accordance with the admiralty practice of England, on the *instance*, and very frequently on the *prize* side of that court. This practice was there adopted, as far back as the 11th of April, 1780, as appears from Marriott's Forms, p. 5.; see a decree for delivery on bond, in same authority, p. 221, 2, 3. How much longer the delivery of vessels and cargoes on bond had been adopted by the English admiralty, I have not now the means of ascertaining, since the first order of the kind, within my research, is the one first above cited. But I was of opinion, in the case of the Good-Friends, and I still retain the same opinion, that that part of the 89th section of the collection law, relating to delivery on bond, was framed with a view to what had been understood to be the usual course of admiralty practice.

I could discover nothing in the cases commonly called the Amelia Island cases, or in any prosecution arising under the restrictive laws, which ought to distinguish them from those of ordinary seizure and prosecution under the revenue laws of this country. It was under this conviction, that this court formed its decree for delivery on bond, in the case of the Good-Friends. The court was strengthened in its decision of that case, by the authority of the case of Jennings v. Carson, 4 Cranch, 23. In that case, C. J. Marshall, in speaking of the constitution and character of a court of admiralty, remarks as follows:—"The proceedings of that court are *in rem*, and their sentences act on the thing itself. They decide who has the right, and they order its delivery to the party having the right. The libellant and claimant are both actors. They both demand from the court the thing in contest. It would be repugnant to the principles, of justice, and to the practice of courts, to

DELAWARE,
1818.

United States

v.
The sloop Pitt
her tackle &c.

DELAWARE, leave the thing in possession of either of the parties, *without security while the contest is pending.*"

1818.

United States

v.
The sloop Pitt
her tackle &c.

Does the navigation act contain any provision by which the practice of the courts should be remodelled, or in any wise altered, in relation to delivery of vessels and their cargoes on stipulated bonds? The spirit of the act is, no doubt, as has been contended, to exclude British bottoms from our ports, in case such bottoms came from colonies interdicted to the citizens of this country. But how will the spirit of this act be infringed by this court pursuing a practice, which has received the sanction of every district in the union, and which practice congress has not modified or abolished, by any provision of the navigation act? Had a new course been prescribed, this court would consider itself bound to conform to legislative direction, and to refuse the application now made, though founded on a practice adopted upon much and able discussion, and after mature reflection.—The only argument attempted to be given, why the spirit of the act will be eluded by a delivery on bond is, that defective appraisements will be made, and that they will operate as so many encouragements to the introduction of future vessels, in violation of the act. To this argument, I respectfully reply, that if defective or improper appraisements should be made, this court will be ever ready to afford that redress which is amply within its power; namely, by setting aside appraisements, and appointing new appraisers as often as corruption or misconduct may have exhibited an inadequate estimate of the property. A vigilance of this kind will always secure an ample substitute for the thing proceeded against, which will remain within the power of the court, to respond to the United States, for the breach of their statute, made by the lawless intrusion of a vessel of a prohibited character.

But will it be equitable to order the sale of a vessel and cargo, when possibly she might have entered our waters without any intention of violating the navigation act? Might not a sale operate as a premature penalty on an innocent person, and a decree of restoration remit to him the scanty proceeds of a hurried sale of his property?—While in the case of a condemnation, the

bonds will afford to the prosecution ample amends for the violation of a public and beneficial law. DELAWARE,
1818.

Lastly, this court is of opinion, that the fourth section of the navigation act, recognizing as it does, the course of proceeding prescribed by the revenue laws, in terms at once broad and comprehensive, (and inclusively too from the commencement to the close of the prosecution) impliedly, at least, adopts the provisions of the 89th sec. of the collection laws in relation to the delivery on appraisement and bond, and as nothing restrictive of any practice of the judiciary, heretofore existing on the subject of delivery on bonds, is discoverable in the navigation act, the inference is a fair one, that no alteration of such practice was in the contemplation of congress when the act was passed.

The decree of this court, therefore, is, that the sloop *Pitt*, her tackle, apparel and furniture, together with her cargo, be delivered to the claimants, on their securing duties payable by law, entering into bonds to respond the appraised value, &c. &c.

United States
v.
The sloop *Pitt*
her tackle &c.

GENERAL COURT.

VIRGINIA, 1815.

Jackson } UPON A CASE ADJOURNED TO THE GENERAL
v. } COURT OF VIRGINIA, BY THE SUPERIOR
Row. } COURT OF LAW, FOR THE COUNTY OF ———.

Jurisdiction
of state courts.

This case was adjourned to the last June term, and continued over for consideration to the November term. At that term, it was argued by the attorney of the United States, for the district of Virginia, before the court, consisting of Judges White, Carrington, Stuart, Holmes, Brockenbrough, Allen, Semple, Randolph and Daniel; and at a subsequent day of the same term, Judge White delivered the opinion of the court, as nearly as can now be recollected, to the following effect.

This is an action of debt, brought by the plaintiff to recover a penalty inflicted by an act of congress to insure the collection of the revenue of the United States, which

VIRGINIA,
1815.

—
Jackson.

v.
Row.

penalty, the same act says, may, under circumstances, such as exist in this case, be recovered in a state court; and the question submitted to the general court is, substantially this: could congress constitutionally give to a state court jurisdiction over this case, or can such court be authorized by an act of congress to take cognizance thereof?

The very statement of the question points out its extreme delicacy and great importance.—It involves the great constitutional rights and powers of the general government, as well as the rights, sovereignty and independence of the respective state governments. It calls upon this court to mark the limits which separate them from each other; and to make a decision which may possibly put at issue, upon a great constitutional point, the legislature of the United States, and the supreme criminal tribunal of one of the states.

Such a question, involving such consequences, ought to be approached with the utmost circumspection, with the most cool, dispassionate and impartial investigation, and with a fixed determination to render such judgment only as shall be the result of solemn conviction. The court has not been unmindful of these things; it has approached the subject with those feelings, and with that determination. It has bestowed its best consideration, its deepest reflection, upon it; and after having viewed it in every point of light in which it has been placed by others, or in which the court has been able to place it, has made up an opinion in which all the judges present concur, and which it has directed me to pronounce.

But before that is done, it will be necessary to lay down and explain certain principles on which it is founded.

1st. It is believed, that the judicial power of any state or nation forms an important portion of its sovereignty, and consists in a right to expound its laws, to apply them to the various transactions of human affairs as they rise, and to superintend and enforce their execution; and that whosoever is authorized to perform those functions to any extent, has, of necessity, to the very same extent, the judicial power of that state, or nation, which authorized him to do so.

2d. That the judiciary of one separate and distinct

sovereignty, cannot of itself assume, nor can another separate and distinct sovereignty either authorize or coerce it to exercise the judicial powers of such other separate and distinct sovereignty.

It is, indeed, true, that the interest of commerce, and the mutual advantages derived to all nations by their respectively protecting the rights of property to the citizens and subjects of each other, whilst residing or trading in their respective territories, have induced civilized nations generally to permit their courts to sustain suits brought upon contracts made in foreign countries, and to enforce their execution according to their true intent and meaning. And in order to ascertain that our courts do permit the laws of the country, where the contract was made, to be proved to the jury, or the court of chancery, as the case may be, as facts entering essentially into the substance of the contract. But, in doing all this, they do not act under the command, or by the authority of the sovereign of that nation. Nor are they exercising any portion of its judicial powers. They are only expounding, applying and superintending the execution of the law of their own state which authorizes that mode of proceeding.

But though there are the best reasons for permitting our courts to sustain suits of this description, there is no good reason why one nation should authorize its judiciary to carry the penal laws of another into execution, and it is believed that no nation has ever done so. And, as has already been stated, there is no principle of universal law which authorizes one sovereign to empower or direct the judiciary of another to do so. Such a right can be acquired by compact only. And we shall presently see whether congress has so acquired it. Without such compact, a fugitive from justice cannot even be demanded, as of right, to be delivered up to the tribunals of the nation whose laws he has violated, much less can he be tried and punished by a foreign tribunal for violating them.

If such a system shall once be adopted it will introduce a strange kind of Mosaic war into the judiciary of nations. Here a Cadi sitting in judgment upon an Italian denying the Pope's infallibility: there the stern Fathers of the Holy Inquisition putting a poor Turk to

VIRGINIA,
1815.

Jackson
v.
Row.

VIRGINIA.
1815.


Jackson.
v.
Row.

the rack because he denies that Mahomet is the Prophet of God.—The judges of republican Virginia pillorying an Englishman for libelling royalty; and the court of king's bench inflicting the same punishment upon an American for libelling the government of the United States, for the late declaration of war.

Thirdly. That the government of the United States, although it by no means possesses the entire sovereignty of this vast empire, the great residuum thereof still remaining with the states respectively, is nevertheless, as to all the purposes for which it was created, and as to all the powers vested therein, unless where it is otherwise provided by the constitution, completely, sovereign; and that its sovereignty is as entirely separate and distinct from that of another. So that, unless as before excepted, it cannot exercise the powers that belong to the state governments, nor can any state government exercise the powers which belong to it. And that there is no one thing to which this principle applies with more strength than to the revenue of the United States and things appertaining thereto; it being notorious that a desire to give congress complete and entire control over that subject was the great and moving principle which called the present constitution into existence. It is admitted, however, that there are some exceptions to this last principle; they are such, however, as only prove the rule itself. Thus, by the second section of the third article of the constitution, among other things it is declared, that "the judicial power of the United States shall extend to controversies between citizens of different states, between citizens of the same state, claiming lands under grants of different states," &c. These powers, in the nature of things, belong to the state sovereignties, and they were, at the time of the adoption of the constitution, in complete possession of them, nor could the courts of the United States, merely as such, by any principle of construction, have claimed them; but there were reasons, at that time deemed sufficient, to justify the extending the judicial power of the United States to them, and they were extended to them, without, however, taking away the jurisdiction of the state courts; so that, as respects those matters, the state courts

and the courts of the United States have concurrent jurisdiction, by compact.

These things being premised, I return to the question: Can congress, by any act which it can pass, authorize the state courts to exercise or vest in them any portion of the judicial power of the United States; more especially that portion of it which is employed in enforcing their penal laws?

I shall not stop here to prove that the act in question is, as respects this case, a penal law, or that to enforce the payment of its penalties, in any way or form, whatsoever, would be to execute, to enforce it. These are self-evident propositions which would only be obscured by any attempt to elucidate them.

Nor shall I waste much time in considering whether our courts can resist an unconstitutional law. That question, as it respects our state laws, has long since been settled in Virginia, and the decisions of her courts have been acquiesced in by the general assembly, with that wisdom and magnanimity which belong to it.

This argument is much stronger as respects the laws of congress, the legislature of a separate and distinct sovereignty, by whose laws we are not bound, unless, to use the very words of the constitution, they are "made in pursuance thereof." Were it otherwise; were the state courts obliged to execute every law which congress might pass, without inquiring whether it was or was not made in pursuance of the constitution, it is most manifest, that the justly-dreaded work of consolidation would not only be begun, but that, in principle, it would be completed: and that state sovereignty and state independence would soon cease to exist.

We have already seen that the government of the United States is, as to the purposes for which it was created, a separate and distinct sovereignty, having rights, powers, and duties, which it is bound to exercise and discharge itself, and which it cannot communicate to the states over which it presides, and which they cannot intermeddle with, and that the judicial power forms a portion, and a most important portion it is, of its sovereignty.

We have seen that there is nothing in universal law, or the usage of nations, which will authorize one sove-

VIRGINIA,
1815.

Jackson.

v.

Row.

VIRGINIA,
1815.

~
Jackson.

v.
Row.

reignty to invest its judicial power, or any part of it, in the courts of another, or direct them to execute it; more especially that portion which respects its penal code.

If, then, congress has a right to vest that, or any other portion of the judicial power of the United States, in the state courts, it must be in virtue of some compact. But there is no other instrument from which such a compact can be inferred but the constitution of the United States. Let us then see where it has deposited the judicial power of the general government; for where it has placed it, there it must remain.

That instrument does not take the least notice of the state courts as respects this subject. But it declares, section 1st of the 3d article, that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish." And by the 8th section of the first article, power is given to congress "to constitute tribunals inferior to the supreme court."

This judicial power then, the whole of it, without any exception, is given to this supreme court, and those inferior courts to be ordained and established by congress. It has never yet been contended that congress can compel or authorize the state courts, or any of them, to perform the functions of the supreme court. By what kind of reasoning then can it support a claim to exercise such a power with respect to the functions of these inferior courts? Did congress ordain and establish the state courts? Did it decree their existence? Did it appoint their judges? Did it institute, did it settle, did it constitute them? Most certainly it has done none of those things. It found them already ordained and established; and finding them so ordained and established, it has by its law directed them to exercise this portion of judicial power of the United States.

But the judges of these inferior courts are to have offices which they are to hold during good behaviour. Now, I take it for granted, that the man who holds an office is an officer, and an officer too of that government whose business it is the duty of his office to perform. And by the 3d section of the 2d article of the constitution, "all officers of the United States are to be com-

missioned by the president," which the state judges are not. VIRGINIA, 1815.

But who does the constitution intend shall decide upon the good behaviour of the judges of these inferior courts? Most unquestionably the senate of the United States, upon impeachment by the house of representatives. So great an absurdity cannot be supposed, as that the constitution intended to put the judicial power of the United States, or any part of it, into the hands of judges in no wise responsible to its government. Yet no man can pretend that the state judges can be impeached and tried by that government.

Jackson.
v.
Row.

Besides, the constitution of the United States does not provide that the state judges shall hold their offices during good behaviour. Congress cannot direct that it shall be so by law, and, in fact, some of them are elected for a limited period, and others may be removed by a vote of their state legislatures. So that if a law of congress should be very unpopular in one of those states, the judges could not execute it but at the risk of their commissions.

Moreover, the judges of the state courts are called upon by this act to exercise judicial power, which they hold at the will of congress, and which may be taken from them by the very breath which gave it; and which it is almost certain, will be taken from them whenever, by a firm and independent exercise of their own judgments, they shall much offend that honorable body. So that under this system, neither the people, nor the government of the United States, would have that security for the uprightness of their judges which the constitution contemplates.

But the judges of these inferior courts are also to receive for their services a compensation which shall not be diminished during their continuance in office, nor during the existence of a particular law, calling for particular services.

From whom are they to receive this compensation? Certainly from the general government, to which those services are to be rendered. But do the state judges receive, or are they to receive, any compensation for these services to be rendered to the United States? Every body knows that they do not. And we know,

VIRGINIA,
1815.

Jackson
v.
Row.

that if any judge of the state was to accept either commission or compensation from the general government, he would by that act vacate his office.

But it is said, that the state courts do take cognizance of suits brought to enforce contracts made in foreign countries, and that they will take notice of those foreign laws, under the faith of which such contracts were made, and enforce them agreeably thereto, and that this suit sounds in contract. But how does it sound in contract? Has the defendant contracted to pay the amount of this penalty to the plaintiff? No, it is answered, it is not precisely so. But it is understood to be a principle of universal law, that every citizen and subject has entered into an implied contract, that he will obey the laws of his country—that the laws of his country subject the defendant to the payment of this penalty—that this suit is founded on that contract, and the state court has, for that reason, jurisdiction over it. Indeed! But before we yield our assent, let us see how far this reasoning will carry us. It is sometimes said, that an argument which necessarily proves too much, proves nothing.

By this same implied contract, every citizen and subject of every government has agreed to submit his head to the block, or his neck to the cord, whenever the laws of his country require him to do so. If, therefore, this implied contract will give us jurisdiction over this penal law, and justify us in enforcing its sanction, the same principle will give us jurisdiction over the entire penal code of every nation upon the earth, which no man can pretend to say we have.

Upon the whole, however painful it may be, and actually is, to us all, to be brought, by a sense of duty, into conflict with the opinions and acts of the legislature of the United States, for which we entertain the highest respect, and the constitutional laws of which we feel it our duty to obey and execute with cheerfulness, when their execution devolves upon us; yet we cannot resist the conviction, that this law is, in this respect, unconstitutional. It is the unanimous opinion of this court, that to assume jurisdiction over this case, would be to exercise a portion of the judicial power of the United States, which, by the constitution, is clearly and distinctly depo-

sited in other hands ; and that by so doing, we should prostrate that every instrument which we have taken a solemn oath to support.

VIRGINIA,
1815.

Jackson
v.
Row.

DISTRICT COURT U. S.

MAINE, MARCH, 1824.

United States }
v. } HABEAS CORPUS.
Isaac Turner. }

Present—Hon. *Ashur Ware.*

Isaac Turner, a man of colour, was brought before the Hon. *Ashur Ware*, judge of the district court of the United States in Maine, on the 8th of March last by writ of habeas corpus. It appeared on examination, that Turner had shipped on board the brig *Effort*, of Salem, Capt. Miller, which was then lying at the wharf in Portland ; that Turner had absented himself from the vessel two nights successively without leave, and the second time was brought on board, late in the following forenoon, by the assistance of a civil officer.

It appeared by the declaration of the owner, that the captain, by his direction, then caused a chain to be fastened to the cook's leg by a blacksmith, with an iron rivet above the ankle ; and that the chain, which was of sufficient length to enable him to traverse the deck, was secured by a lock to an iron ring, bolted into the deck. It appeared that during the day time, he was kept in this situation confined to the caboose house or galley, at his work as cook. At night his chain was unlocked, and he was secured in a place particularly fitted up for him between the decks, so as to enable him to get in and out of his berth, but at the same time so as to prevent his escape. He was kept in this situation alternately day and night, for the space of from five to seven or eight days, by order of the owner, considering it, as he alleged, more for the benefit of the cook himself, than to cause

To claim a seaman, who had absented himself from the ship for two nights, by an iron chain fastened to the deck for the purpose of preventing his escape is not contrary to the general spirit of the maritime law, nor to the act of congress July 20, 1790.

MAINE,
1824.

United States

v.
Turner.

him to be committed to prison under the statute at the expense of the cook himself, which he several times solicited.

There was no proof, however, of any ill treatment on the part of the owners or officers of the vessel, beyond what might necessarily arise, or be inferred from these circumstances, except from the declaration of the cook himself, that he was quite unwell during a part of the time. He was permitted to have no communication with any person on shore, from an apprehension that they might assist him in escaping. It was acknowledged by the cook that he finally contrived to file off the rivet around his leg, and make his escape from the vessel, as it appeared, during supper time, although he complained that his leg was so much galled as to prevent his escaping to any considerable distance. He was re-taken within a day or two after, and committed to prison; and these circumstances appearing as thus stated on the examination upon the habeas corpus, it was moved on his behalf that he should be entirely discharged.

It was urged on behalf of the prisoner, that this mode of restraint, securing seamen like a criminal on the deck of a vessel, with chains and fetters, by the side of a public wharf, was such a violation of the personal rights of the seamen, such a public scandal, and so revolting to the spirit of our laws, as amounted to a total dissolution of the maritime contract, and entitled the seaman to an absolute discharge.

By the court.—The contract of hire for marine service stands, on reasons in many respects, peculiar to itself, and bearing a strong analogy to contracts for military service. A seaman who abandons a vessel is not considered merely as violating a civil contract, but as, in some degree, a criminal, and liable to corporeal punishment. There was nothing in the mode of punishment adopted on this occasion contrary to the general spirit and principles of the maritime law. There was, under all circumstances, no excess of punishment in this case; and lastly, the statute of the United States, (July 20th, 1790,) providing for the apprehension of deserting seamen by warrant, and their confinement in prison, is only auxiliary to the marine law, and does not supersede it even in the ports of the United States. The prisoner was therefore remanded into custody.

GENERAL SESSIONS.

NEW YORK, SEPTEMBER, 1820.

The People
v.
John G. Scholtz and Daniel L. Scott. } CONSPIRACY.

Present—*Hon. Cadwallader D. Colden*, Mayor.

P. C. Van Wyck, Counsel for the People.

Price and David Graham, Counsel for the Defendants.

By the Court.—The defendant Scholtz was convicted by the verdict of a jury, on an indictment containing two counts, the first of which charges, that he and Scott intending unlawfully, fraudulently and deceitfully, to cheat and defraud one Miller, and unlawfully to obtain from him his property and moneys, viz. 200 dollars due to him on a pension granted by the United States, did conspire to defraud, cheat, and from him (Miller) to obtain \$200 as aforesaid, viz. the money due on the pension aforesaid, &c.

An indictment charging a conspiracy by cheating and defrauding a person of his money, need not state the means by which the conspiracy was effected.

The second count charges that Scholtz and Scott conspired and combined to defraud and cheat the president of the Branch Bank, viz. Isaac Lawrence, to obtain by fraudulent means, \$200 due the said Miller, upon a pension granted to him by the government of the United States, &c.

A motion is made by the prisoners' counsel, in arrest of judgment, founded on the following objections to the indictment :

1st. That the indictment does not state the means which the conspirators intended, or had agreed to adopt, to effect their object.

2d. That it does not state that the defendants unlawfully conspired.

3d. That the indictment is fatally incorrect by the omission of the word "him."

In support of the first objection, it is contended, by the defendants, that though it may be sufficient to state that the defendants conspired when the object of the con-

N^W YORK,
September,
1820.

The People
v.
Scholtz and
Scott.

spiracy is in itself unlawful, yet where this is not the case, where the object to be effected may be lawful, then the indictment must show that the conspirators had agreed or intended to pursue unlawful means to effect their end; and to apply these principles to this case, it is contended, that the object of the conspiracy, as set forth in the indictment, was not necessarily unlawful, because it might not have been unlawful to obtain Miller's \$200.

But the indictment states, that the defendants conspired and agreed to obtain the money by cheating him. To cheat and defraud a man of his money is certainly unlawful, and therefore I cannot think the principles advanced by the defendants' counsel, however correct they may be, apply to this case.

I forbear to reason on the subject farther, because I think the authorities which have been referred to, on the part of the prosecution, establish the validity of the indictment.

In the note to 13 East, 231. we have the opinions of Lord Mansfield and Judge Buller, that it is sufficient to state the conspiracy and its object, and that it is not necessary that the means should be set forth. In that case (The King against Eccles and others) the defendants were indicted for conspiring, by indirect means, to prevent one H. B. from exercising the trade of a tailor. It was moved to arrest the judgment, because the indictment did not state the fact upon which the indictment was founded, or the means used, or intended to be used, for the purpose. The two great law characters I have mentioned, overruled the objection: Judge Buller saying it would have been sufficient that the defendants conspired for the purpose mentioned, without saying that they intended to effect it by indirect means. Now, if it be said that this decision was made on the ground that the object of the conspiracy was unlawful, viz. to prevent H. B. from exercising the trade of a tailor, it may be answered, that it did not follow, necessarily, that it was unlawful to do this, because, peradventure, he might have wanted the qualifications requisite, by the laws of England, to authorize him to follow that trade. At all events, it must be as unlawful to cheat and defraud a man of his money, as to endeavour or design to prevent his exercising a particular trade.

There are, in a variety of books of high authority, precedents which support the sufficiency of this indictment;

among others, (3 Chitty, 1186. 1188. Starkie, 685.) In each of these cases, the indictment contains a general count of this nature.

So, in an indictment against a person for being accessory to a felony, before the fact, it is not necessary to set forth the means, by which the accessory incited or aided the principal to commit the felony, or where the charge is against an accessory, after the fact, how the accessory comforted the felon, because, says the book, it was perfectly immaterial in what way the purpose of the one was effected, or the harbouring of the other secured; and, as the means are frequently of a complicated nature, it would lead to great inconvenience and perplexity, if they were always to be described upon the record. It is on this last ground that this case of conspiracy, and some others, are permitted to be exceptions to the general rule that an indictment must not only charge the *ubi quando, quid, &c.* but the *quo modo*; and if this exception was not admitted, as to conspiracies, it would, in most instances, be impossible to frame a good indictment. For if the means by which it was intended to effect fraud must be stated, it must be that all the means are to be fully and truly stated; an omission or mis-statement, as to any particular and essential part, would be fatal. When it is considered how ingeniously complicated these fraudulent schemes are, it must be obvious how difficult it would be, in most cases, to set out truly, on the face of an indictment, all the contrivers may have intended. The testimony on the trial afforded evidence of a combination of circumstances which the defendants had involved in their designs, that could not have been set out in an indictment with all legal force and certainty, without a prolixity which would be highly inconvenient.—Indictment held sufficient.

N^W YORK,
September,
1820.

The People
v.
Scholtz and
Scott.

CHILICOTHE, (OHIO.)

The State
v.
Isaac Evans.

Indictment under the act entitled "an act to prohibit the issuing and circulating of unauthorized bank paper." Defendant was charged with passing an unauthorized bank note of the Owl Creek Bank of Mount Vernon.

Present.—*Thompson. J.*

Messrs. *Bond and Sill*, for the prosecution.

Messrs. *Breecker and Creighton*, for the Traverser.

Bank bills
not money,
within the
statute pro-
hibiting the is-
suing of unau-
thorized bank
paper.

On the part of the traverser, it was contended, that the legislature, in the second section of the above act, in the following words, "that every company or association that *shall lend money*, and shall issue by their officer or officers, or by any person or persons, bonds, notes, or bills payable to bearer, or payable to order, and endorsed in blank, or use other shift or device, whereby the bonds, notes, or bills, given by such company or association, or on their behalf, pass or circulate by delivery, shall be taken and deemed a bank," by this act had so particularly described the institution what should be deemed a bank, that unless evidence sufficiently strong to prove the "Owl Creek" association to be of this nature had been adduced, the traverser must be acquitted; that no proof having been adduced to substantiate the fact of that association having lent money, i. e. specie, it was not a bank within this act. So particular is the description, that no allowance of what might have been the intention can be admitted—that the word *money*, as used in the act, as contradicting distinguished from bills, clearly shows what is the intention. If it had been intended only for associations that issue bills, the words *lend money* should have been left, for that is an essential requisite to constitute such a bank as this act would embrace: for an association that does *not loan money*, but issues bills, is not a bank within this act, the circulation of whose paper is prohibited.

2dly, The constitutional objection was raised that the legislature had not a right to interfere with contracts ; that they could pass no law impairing their obligation, and that they had no right to grant hereditary privileges of which it was endeavoured to be shown a bank is one ; that the granting of incorporations was a dangerous thing ; that much was to be apprehended from their increase, and final monopoly of the interest of the state ; that the legislature had not a right to impair one man's credit by saying that his paper is not good, and its circulators shall be punished, and at the same time say to others, your paper is good, the world may take it.

On the part of the prosecution it was contended, that the word *money* thus used in the act was to be received in its most known and usual acceptation, i. e. the common currency of the country ; that the word as used in the statute books in bonds and in security, and in every instrument, meant the common currency of the country ; and that it should not now, by a peculiar fatality, be construed to mean *specie*, that the statute was meant to provide against an evil, and that it would completely be repealed, and its remedies not advanced, if the construction given by the counsel for the traverser was to be received ; that as to the constitutionality of the law, there will be no doubt, the restriction of the legislative powers over contract was admitted. But it was contended that it applied only in contracts executed or executory, but not to such as should be hereafter made. The legislature had an equal right to regulate the emission and circulation of spurious paper, as they have exercised over retailers of spirituous liquors, and in many other similar instances ; and, in such fragrant cases, over institutions based on fraud, and supported by usury. To say they have no power, is neither policy nor law ; the power is weak enough to stop the growing curse, and courts of justice ought to advance, rather than hinder the advancement of the remedies.

The jury retired after receiving the charge of Judge Thompson, who declared the law constitutional, and thought that from the strictness which had been used in framing that law, and the precision in its penning, particularly in defining a bank within the meaning of the act.

The jury returned a sealed verdict, finding the facts

CHILICO-
THE,
(Ohio.)

The People
v.
Evans.

CHILICO-
THE,
(Ohio.)

The State.

v.

Evans.

of passing the money, and under the knowledge of its being unauthorized, and said, if the court think the bill money, we find the defendant guilty, if not money, not guilty.

After continuing the point under advisement several days, the court decided the *bill was not money*, and the defendant was acquitted.

SUPREME COURT.

Commonwealth of Pennsylvania

v.

Nicholas Kosloff.

Tilghman, Chief Justice.

MOTION TO QUASH.

A consul general is not protected by the law of nations on indictment for a rape.

Jurisdiction of state courts.

The grand inquest for the city and county of Philadelphia, having preferred a bill of indictment for a rape against Nicholas Kosloff, consul-general of his Imperial Majesty the Emperor of Russia, a motion has been made to quash the indictment for want of jurisdiction in this court. Two causes are assigned for our want of jurisdiction. 1st. That the privilege of immunity from criminal prosecutions is conferred on consuls by the law of nations. 2d. That by the constitution and laws of the United States, exclusive jurisdiction in all cases affecting consuls, is vested in the courts of the United States.

1st. It is granted that, by the modern law of nations, ambassadors and other public ministers are, in general, exempt from criminal prosecutions. Perhaps there are some offences, such as an attempt on the life of the sovereign with whom they reside, which would warrant their punishment. But in every thing short of an extreme case, it is more conducive to the peace, and more agreeable to the usage of nations, to send them to their own sovereign, to receive from him the punishment they deserve. It has not been contended that a consul is a public minister; but it is said that a consul general, such as Mr. Kosloff, is prohibited from exercising trade and commerce, and entrusted with important concerns of his sovereign, so nearly resembles a public minister, that he is entitled to some of his prerogatives, and, in particular, to exemption from criminal prosecution. In

considering this case, we must exclude from our view the august personage to whom allusion was made in the argument. Concerning his high character, and the intimacy of the relations to be preserved with him, there is but one voice, one wish. These considerations would have their deserved weight in their proper place; but before us, there is only a naked question of right, in which all nations are equally concerned, for we cannot but see that what is granted as the right of one, must be conceded as the right of all. The law of nations is to be sought for in the usages of nations; in the opinions of approved authors and in treaties, and in the decisions of judges, with regard to the privileges of consuls, there is some difference of opinion among respectable authors. Wicquefort, Bynkershoeck, and Marten, allow to a consul no privilege against suits civil or criminal; and the reason they assign is, that consuls in no manner represent the person of their sovereign, but are sent for the purpose of assisting his subjects, particularly in matters of commerce, and sometimes of deciding disputes, which may arise between them, by permission of the government in whose dominions they reside. (See Wicquefort *l'Ambasdeur*, book 1. p. 65., Bynkershoeck *De forolegatorum*, chap. 10. p. 110. Barbeyrac's translation into French, Marten's *Summary Law of Nations*, book 4. chap. 3. sec. 8.) Opposed to them is Vattel, who, although he does not assert that a consul is entitled to the privileges of a public minister, in general, is yet of opinion that, from the nature of his functions, "he should be independent of the ordinary criminal justice of the place where he resides, so as not to be molested or imprisoned, unless he himself violates the law of nations by some enormous crime." Vattel, vol. 2. chap. 2. sec. 34. I am not quite sure what is meant by violating the law of nations in this passage. Crimes against the law of nations are sometimes understood to be crimes which all nations agree to punish—such are murder and rape, among all civilized nations; and if that be the meaning of Vattel, his authority would not exempt the consul from the present prosecution. But what is of more weight than the judgment of authors, however respectable, is the opinion and the practice of our own government, and that of the foreign nations with whom we

PHIL'A.

Com'd

V.
Kosloff.

PHIL'A.

Com'th

v.

Kosloff.

have had intercourse. We have had treaties with France, Spain, Great Britain, Holland, Prussia, and Sweden, in all of which the subject of consuls has been introduced, and in not one of which have consuls been protected from suits civil or criminal. I say nothing of our treaties with the Barbary powers, because there are special reasons why all nations, who send consuls to them, take care to provide expressly for their personal security. In the treaty with Great Britain, made 1794, consuls are expressly declared to be subject to punishment by law of the country in which they reside. By the consular convention with France in 1788, there is to be full and perfect immunity concerning the chancery and its papers, but the house of the consul is to be no asylum for persons or effects; and in our treaties the most that is stipulated in favour of consuls is, that they shall respectively enjoy the same prerogatives and powers that are granted to those of the most favoured nations. Those treaties afford a strong proof of the usages of nations; for it cannot be supposed, that they should have omitted to secure consuls from criminal prosecutions, if it had been thought desirable or usual, to afford them that protection. But there is not wanting more direct proof of the opinion of our own government: In the "act for the punishment of certain crimes against the United States," passed April 20, 1790, penalties are inflicted on persons who sue out process, from any court, against an ambassador or other public minister; but the act is silent as to consuls. And, what is directly to the point, the 9th sec. of the "act to establish the judicial courts of the United States," passed September 24, 1780, vests the district courts with jurisdiction of offences committed by consuls, in which a punishment did not exceed 100 dollars, &c. &c. Neither are we left, on this important subject, without the light of judicial decision. Mr. Ravara, consul from Genoa, was indicted and convicted of a misdemeanor in the circuit court of the United States. He was defended by able counsel, who contended for his privilege, on the authority of Vattel. But the court decided against him; and it is worthy of remark, that C. J. Jay presided, who had been long employed in a function of a high grade, at the court of Madrid, and was one of the ministers of the United States, who negotiated at Paris, the treaty which

established our independence. No person certainly had better opportunities of knowing the usage of nations, or a better capacity of improving those opportunities. From all these considerations, I cannot hesitate in the opinion, that there is nothing in the law of nations which protects the consul general of Russia from this indictment.

2d. A more difficult question remains to be considered: Is the jurisdiction of this court taken away by the constitution and laws of the United States? Before I go into an examination of the constitution and laws, it may not be improper to say a word or two respecting the subject out of which this question arises. An agent of a foreign government, accused of a crime committed in the state of Pennsylvania, claims not an exemption from trial, but the right of being tried by the courts of the United States. His public relations are not with the state of Pennsylvania, but with the government of the United States; and if the emperor of Russia should suppose that he had cause to complain of our treatment of his officer, he must address himself, not to the governor of Pennsylvania, but the president of the United States. But even where there was no cause of complaint, cases may be easily supposed in which the president might think it more conducive to the peace of the nation, to send a foreign agent out of the country, to be punished by his own sovereign, than to inflict punishment on him by our own laws. These considerations are so manifest, that when the people of the United States were about to form a federal government, through which alone they were to maintain an intercourse with foreign nations, it would have seemed a want of common prudence not to commit to that government the management of all affairs respecting the public agents of those nations. Let us now advert to the instrument of our federal union, and we shall soon perceive that the statesmen who framed it were perfectly aware of the importance of placing all foreign public agents, consuls included, under the complete superintendence of the federal government. It was through the judicial power that those persons could principally be affected. Accordingly we find it provided by the 2d sec. of the 3d art. of the constitution, that the judicial power shall extend "to all cases affecting ambassa-

PHIL'A.

Com'th

v.

Kosloff.

PHIL'A.

Com'th

v.

Kosloff.

dors, other public ministers and consuls:" words more comprehensive cannot be devised. They include suits of every kind, civil and criminal. This is not denied by the attorney general of Pennsylvania; nor, as I understand, is it denied that, by virtue of this provision, congress has a right to declare by law, that in no case, civil or criminal, should a state court have jurisdiction over a consul. But it is contended, that until congress does by law declare so, the state courts have concurrent jurisdiction with the courts of the United States; or, rather, that in the case before us, the state courts alone have jurisdiction; because, congress having passed no law defining the crime, or the punishment of rape, the courts cannot take cognizance of the offence. The constitution in the 1st sec. of the 3d article, declares in what courts the judicial power shall be vested, viz. in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. In the second section, it enumerates the different cases to which the judicial power shall extend, and then goes on to direct the distribution of that power among the different courts, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and facts, with such exceptions, and under such restrictions as the congress shall make." Thus the judicial power, extending to all cases affecting consuls, being vested in the supreme court, it follows, that as soon as the supreme court was organized by law, it became immediately vested with original jurisdiction in every case in which a consul might be affected. But was this an exclusive jurisdiction? The opinion of the supreme court, in *Marbury v. Madison*, 1 Cranch, 137. goes far towards establishing the principle of exclusive jurisdiction. The point decided in that case was, that where the constitution had not vested the supreme court with appellate jurisdiction, it was not in the power of congress to give appellate jurisdiction. This will appear from the following extract from that opinion. "If congress remains at liberty to give this court appellate jurisdiction where the constitution has declared their jurisdiction

shall be original ; and original jurisdiction where the constitution has declared it shall be appellate, the distribution of jurisdiction made in the constitution, is form without substance. Affirmative words are often, in their operation, negative of other objects than those affirmed, and, in this case, a negative or exclusive sense, must be given to them, or they have no operation at all. If the solicitude of the convention with respect to our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them ; yet the clause would have proceeded no farther than to provide for such cases, if no farther restriction on the power of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction, unless the words be deemed exclusive of original jurisdiction."

Now, taking this to be the construction of the constitution, all those parts of the "act to establish the judicial courts of the United States," which vest jurisdiction in cases affecting consuls, in the district or circuit courts, would be unconstitutional and void ; and if it was intended by the constitution that no inferior court of the United States should have jurisdiction, it cannot be supposed that the state court was to have it, because there are much stronger reasons for denying it to the state courts, than to the inferior courts of the United States. It will be perceived that the principle shakes the decision, in the case of *Bavara*, who was convicted in the circuit court, though not that part of the decision which respects the privileges of a consul. But if the two cases cannot be reconciled, the circuit court must give way. Supposing, however, for argument sake, that the constitution does not vest the supreme court with exclusive jurisdiction, let us see whether congress has not excluded the state courts by the judiciary act, passed 24th September, 1789. By the 9th section, the district courts are vested, exclusively of the courts of the several states, with cognizance of "all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding 100 dollars, or a term of

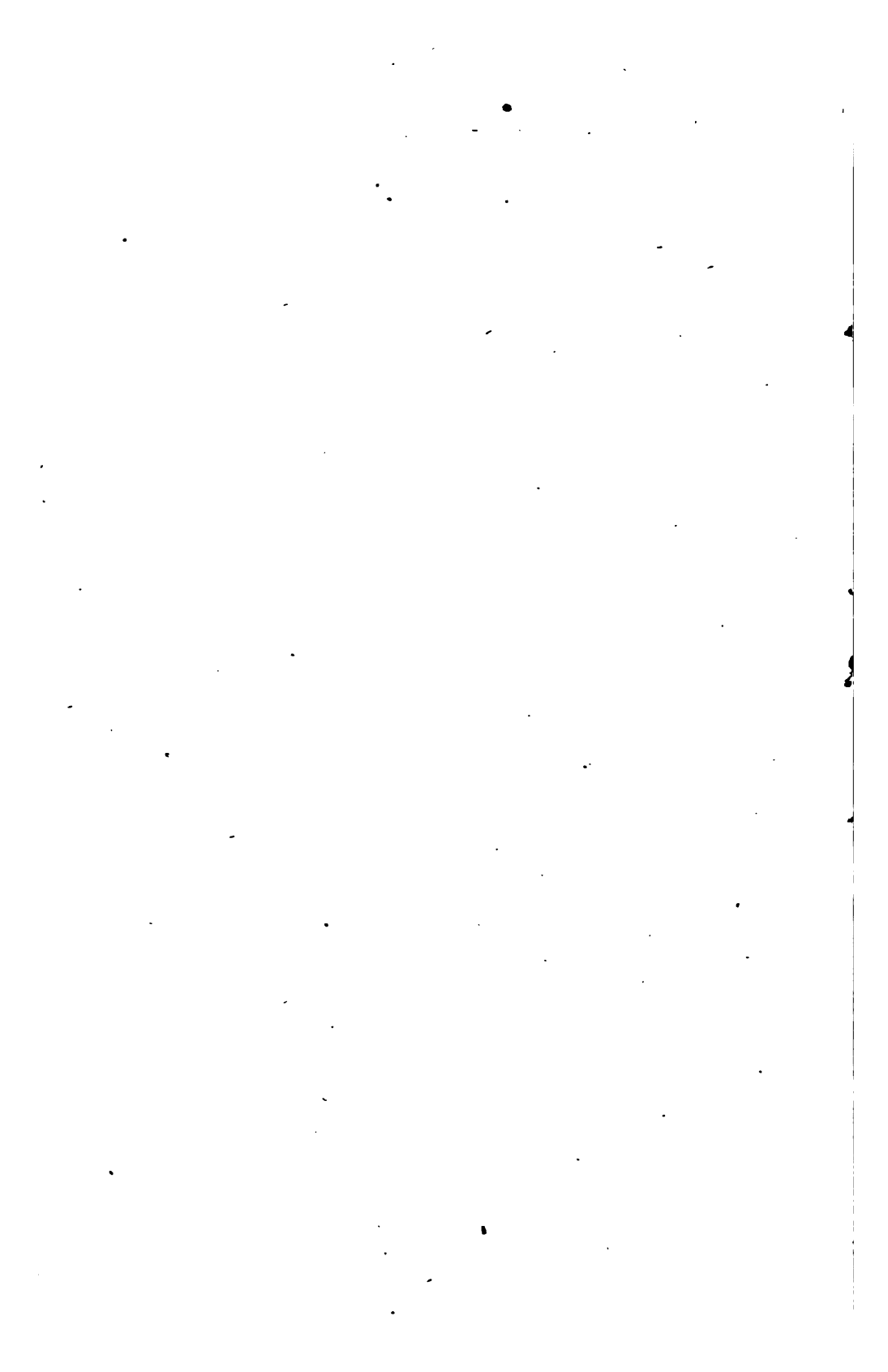
PHIL'A.



Com'th

v.

Kosloff.



I N D E X .

ACCESSARY. Case of,	324
Evidence against,	328
AFFRAY. No excuse in murder when violent, and the weapon an axe,	242
AIDING and ABETTING, &c. in the robbery of the mail,	315
Evidence in a case of,	328
APPRENTICES. Is the business of an equestrian so far as it relates to an apprentice <i>contra bonos mores</i> or not?	159
ARRAIGNMENT,	304, 305
ATTORNEY and COUNSELLOR. Case of one strick- en from the roll,	344
Will be stricken off for acts that would have prevented his admission,	347
BANK BILLS, not money,	620
BLAKE. His argument in a case of murder,	247
BUCKINGHAM'S cases of libel,	181—428
BURGLARY. Cannot be inferred by finding stolen prop- erty in possession of the accused, although larceny may,	55
CHALLENGES. Defendants in one indictment not al- lowed to sever in,	141
CIRCUMSTANTIAL EVIDENCE. How's case of,	410—425
Circumstances of, enumerated,	410
Jones' case of,	462
Judge Parks' remarks upon,	ib.
COLDEN, Mayor. His decision in Scholtz's case,	617
COMMISSION, Foreign. Allowed to be given in evi- dence, and for what purpose,	546
CONFESSION OF PRISONERS. Practice of justices of the peace to take, in Pennsylvania,	150
Private individuals have no authority to take them,	ib.
Induced by saying, "if you do not tell all you know	

- about the business, you will be put in the dark room and hanged," cannot be given in evidence, 469
- Other cases, ib.
- See examination.
- CONSPIRACY. Form of indictment in, 141, 2
- Letters not containing any direct proof of conspiracy may be read before the conspiracy is proved, 143
- Must be established by proving certain acts which occurred previous, subsequent, or while it was carrying on after a proper foundation has been laid, secondary evidence may be introduced, even in furtherance of the charge, though not laid in the indictment, 147
- Overt act in, laid in the county of Berks, delivery of goods may be proved in the county of Philadelphia, 148
- Evidence may be admitted of other acts indicative of criminal collusion with other persons to show the *quo animo*, 256
- The examination of a prisoner implicating others, cannot be read, 257, 8
- Case of the journeyman cordwainers, 262
- Form of indictment in the case of, 263, 4
- One conspiracy cannot justify another, 269
- Sketches of Mason's, Sampson's, Colden's, Griffin's, and Emmet's speeches in the cordwainers' case, 271—279
- Charge of the court in, 279—282
- The gist of, is the unlawful confederacy, 279
- Journeyman confederating and refusing to work, may be convicted of,—the offence consists in the *conspiracy*, and not in the *refusal*, 280
- An indictment charging a conspiracy to de-
- CONSTRUCTIVE LARCENY. Rule established by the court in cases of, 259
- COUNSEL. No law requiring their presence at the examination of a prisoner. (Johnson's case,) 361
- CONSUL GENERAL. Not protected by the law of nations on indictment for a rape, 623
- COURTS. Their power to decide constitutional questions, 23
- Their duty to declare the law to the jury, 479
- Of the U. S. and of the states, their jurisdiction, 594—647
- DEFENDANTS. When must be joined in indictment, 519, 20
- When may be tried severally, ib.
- DISTURBANCE. Of religious worship, cases of, 135.6—8, 9
- By contradicting a minister in the execution of his office, 239
- Blasphemies, libels, slander, &c. against religion, 239

Disturbing divine service is indictable at common law, notwithstanding the statute (1 R. L. 195, N. Y.) declares the penalty and points out the remedy,	136
Levy's case of,	246
DUELLING. Barker's case of,	19
DYING DECLARATIONS may be given in evidence when made under a full belief the party will not survive,	398, 9
<i>Quere</i> , may they when there is a faint hope of recovery,	398
EXAMINATION OF PRISONERS. Magistrate or clerk must prove it, (when objected to)	241
Practice in relation to, in the court of sessions,	241
Should not the examination be read in all cases when the prisoner requests it?	241
Taken for the benefit of the prisoner,	241
Magistrate compelled to take it,	241
On a charge of murder, it is no objection to reading the examination of prisoner (who denies it to be free and voluntary at his trial,) that he was taken out of prison to the dead body of the person he was charged to have murdered, and was requested by the officer to touch it,	378
Parol evidence of facts disclosed by third persons, in the presence of the prisoner, and assented to by him, cannot be given in evidence, if it appears that the prisoner was at the time under the examination,	377
EVIDENCE.—On indictment for rape,	143—152
Allowed to be given of the name of a firm, after the counsel had summed up,	254
Allowed to be given in a case of murder, of the colour of a bastard child, after the counsel had summed up,	255
The conviction of a person of a crime in the circuit court of the United States, is the most conclusive evidence against the accessory that such a crime was committed,	328
ENLISTMENT, under the act of congress March 16, 1812,	541
FALSE PRETENCES.	
Where a defendant falsely stated that he was a grocer, and that he resided at a particular place, and thereby obtained goods, held a false pretence, under the statute, and not a mere naked falsehood.	161
The question whether a pretence was such an one as might have been guarded against by ordinary prudence, is a question exclusively for the jury,	161
But when it is manifestly such as could not by possibility deceive a man of common sagacity, in which latter case (scmb.) the court will arrest the judgment,	161
VOL. II.	80

- The false pretence set forth in the indictment, must be the *sole* inducement to the parting with the goods, 161
- If it appears that any *act or declaration of the prisoner*, forming part of the *res gesta*, and not set out in the indictment, formed part of the indictment, the prisoner is entitled to an acquittal, 161
- Mere accidental circumstances, however, not forming part of the *res gesta*, need not be set forth, 161
- Statute of, has a very extensive application, and embraces a variety of false pretences, not punishable at common law, 178
- Cannot consist in show or appearance, 178
- Must be made before the property is delivered, 178
- Must be of an existing fact, 178
- Must not be so absurd and irrational, that no man of common sense would believe it to be true, 179
- The false pretence must be the sole inducement for parting with the goods, 180
- Dress, style, appearance, &c. although they may facilitate fraud, need not be set forth in the indictment, 180
- Should when they form part of the *res gesta*, 180
- Fitting out and arming vessels, 234, 235
- Vessel must be *armed* as well as fitted out.
- FIRES.** Construction of the act in relation to, in New York, 74
- Any material alteration in a building; any considerable augmentation of it, so as to enlarge its dimensions laterally, or on its sides, is within the act, 76
- FUGITIVES** from justice, 1
- Opinion of eminent writers on the law of nations, in relation to delivering up, 3, 4, 5—13, 14
- Reasons why fugitives should not be delivered up, 11, 12
- Laws of the United States in relation to, exclusive of state laws as to the objects they embrace, 594
- GOOD BEHAVIOUR.** Recognizance of, should not be demanded on a charge of a libel, before conviction, 533
- When is part of the judgment, 534
- Cases where it has or has not been demanded, 535
- Graham, Dr.* His speech in Ward's case, 129
- GUARDIAN.** The father's right to his children, whether it results from guardianship by nature or nurture cannot now be brought into question, 522
- Custody of the infant is for his own benefit, 523
- Rights of, depend upon the municipal laws of a state, 523
- Guardian or parent cannot compel him to enlist in the army or navy, 524

HABEAS CORPUS. Case of Elkinson on writ of, Case to which the authority of a judge of the U. S. does not extend,	70
HOMICIDE. Cases of—page 1-47. 102. 226. 347. 361. 390.	
412. 452. 470. 490.	
When excusable, justifiable, or felonious,	497
HOMINE REPLEGIANDO,	71
Cannot be refused when applied for,	73
INDICTMENT for conspiracy need not state the means used,	618
Form of, in cases of murder,	226. 362. 490.
Of for robbery of the mail,	283
Form of, for libel,	181
Form of, for conspiracy,	263
Of the goods of a firm (G. L.) how described,	254
Copy of, when should be served upon prisoner,	304, 5
Where separate and distinct felonies are charged in different counts in the same indictment, the court may compel the district attorney to elect the counts he intends to rely upon,	365
But will not interfere unless the party is embarrassed, &c.	365
INFANTS. Enlistment of, in the U. S. service,	525
INNKEEPER. Cannot detain a horse in the mail stage for food,	518
INTERROGATORIES TO JURORS. Decision of the court upon,	367, 8
See jurors.	
Neither the court or counsel are concluded by,	368
JEOPARDY. Meaning of the term in the act of congress, April 20th, 1810, sec. 19. 311 to 325.	335
JOHNSON. A decision of his in relation to importing negroes and persons of colour into the state of South Carolina,	56
JUDICIAL AND MINISTERIAL POWERS,	560
JUDGMENT. Motion in arrest of, for aiding, &c. in robbing the mail,	328
JURISDICTION. Of the circuit court,	300. 339
Of the United States, within ceded tracts of land made by a state, (<i>See preface.</i>)	490
JUROR. Excuse of one refused,	246
Practice in the General Sessions, New York, as to setting aside,	246
Cannot challenge himself,	246
Interrogatories put to them in Burr's, in Callender's, in Selfridge's, in Goodwin's, in the mail robbers', in Milligan's, and in Johnson's cases,	265

JURY. Cannot disparage their own verdict,	22
When may be discharged by the court in a criminal case,	100, 101
May for a moral, as well as physical disability, to find a verdict,	100
Cases in relation to discharge of, collected,	473
LARCENY, G. & P. Cases of,	-240. 253. 259. 511
Of goods of a firm, how to be charged in the indictment,	254
Constructive larceny,	511
LAW OF NATIONS. In relation to fugitives from justice,	3
LETTERS.	
When may be read to the jury, in conspiracy,	144, 145
In misdemeanor for sending a challenge,	248, 9
LIBEL. Case of,	26
Indictment for, form of,	181
Trials for, are rare, and excite an interest out of proportion to the offence,	190
Definition of a,	191
Constitutional provision relating to,	191
Publication of a, is not less likely to produce violations of the peace, because it is true,	192
The judges formerly decided whether the matter charged was libellous or not,	193, 4
The jury now decide both law and fact,	194, 5
Charge to the jury in case of,	189
Truth allowed to be given in evidence in a case of, to show the <i>quo animo</i> .	356
A book from which the libel was extracted, read to show the <i>quo animo</i> ,	33
Eloquent sentence of the court in Judah's case,	37
Defendant may be bound in a recognizance for his appearance, but not for his good behaviour on a charge of,	533
Duane's case of,	533
Morris' case of, (Virginia.)	464
Truth on a charge of, (in Virginia,) cannot be given in evidence,	466
LIBERTY OF THE PRESS. What,	196
LIEN. Cannot exist against the government,	514
MAIL. Robbery of, Hare's case in full,	283
Form of indictment for,	283, 4
Messrs. Kell's, Winder's, Finley's, and Wirt's arguments in Hare's case,	311 to 324
Decision of the court,	324

Wood's case of aiding and assisting in,	325
What acts amount to robbery of the,	283. 325
Obstructing of, case of,	518
MALICE. On indictment for libel, may be inferred, 201.	490
Provocation is no excuse.	
MAXWELL, (District Attorney.) His speech in Judah's case,	29
His opening speech in Johnson's case,	370
His reply to the counsel in Johnson's case,	385
His opening speech in Anderson's case,	391
His reply in Anderson's case,	404
MINISTER, PUBLIC. Has no privilege until accredited,	234
MINORS. May enlist in the land and naval service without the consent of their parents,	528
The power to enlist minors in the naval service is included within the power delegated to congress by the constitution,	524
Enlistment of, in the service of the U. S. is a personal contract, and is binding,	525
MISDEMEANOR. Case of, by sending a challenge,	246
MURDER. See homicide.	
Case of,	223
Postponement of trial in a case of,	225
For the absence of witnesses,	225
On account of popular prejudice,	225
To counsel another to commit suicide, and he does commit it, is murder,	230
Advice to commit, presumption of,	231
A singular case of,	226
Parker, justice, charge in a case of,	230
Tuhi's case of,	242
Chief justice Thompson's charge in a case of,	244
Edwards, J. charges in case of,	387. 407
Davis and Story's charges in a case of,	494. 510.
Owen's case of,	260
The length and depth of the wound must be expressed in indictment for,	261
Garretson's case of,	347
Principals in,	347
Blake's argument in a case of,	349
In Pennsylvania, under the act of 1794, wilful, deliberate, and premeditated,	85
Killing in a sudden affray,	471
MUTE STANDING. Cases of, (mail robbers,)	285
Johnson's, Glenn's, Mitchell's, Hoffman's, and Kell's, arguments on the law of,	286 to 299
Decision of the court on the law of,	299
Standing mute on a charge of felony against the laws	

of the United States, is equivalent to a plea of not guilty,	299
NATIONAL INDEPENDENCE, how proved,	597, 601
NATIONS. Law of, will not protect a consul general on indictment for a rape,	622
Authorities from eminent writers upon this subject,	623, 4
In relation to delivering up fugitives from justice,	3
Authorities from eminent writers,	3, 4, 5, 6
NUISANCE. Indictment for,	519
Defendants may be severally charged in,	519
Law in relation to,	510, 20
ONUS PROBANDI. When it lies upon the prosecutor,	251
When upon the defendant,	252
PARENTS cannot bind their children apprentices in the army or navy,	529
PEINE FORTE ET DURE, judgment of, cannot be given in the United States,	301
PINCKNEY; his speech in Hodges' case,	486
PIRACY. Crime of, defined by the law of nations with reasonable certainty,	205
Definition of the crime,	219
Robbery upon the high seas, is piracy by the law of nations, and by the act of congress, 3d March, 1819,	219, 220
Construction of the act,	220, 231
Special verdict in,	218, 222
Power to punish piracies, includes the power of ascertaining and fixing the definition of the crime,	219
Perez, case of,	96
PLEADING. Time of, (on indictment)	304, 5
PRICE; his speech in Johnson's case,	382
RAPE; case of, on a child seven years old,	152
Force necessary at common law,	152
Not by statutes 18 Eliz. c. 7., and 1 R. L. p. 156., where the party is under 10 years of age.	
Does not extend to an attempt to commit a,	152
Presumption of force on a child 7 years of age,	153
On indictment for, you may prove the particulars of the injury before you prove the prisoner committed it,	143
If the offence is not brought home to the prisoner, of course the evidence goes for nothing,	431
On an indictment for, there is no time fixed by law to infer puberty,	42
It depends more upon the constitution and habits of body, than upon age,	42

RECORD, of a presiding judge of the Circuit Court U. S.	
what is a sufficient one,	328
The seal of the Court must be affixed to it,	328
RELIGION; freedom of,	236, 237
Offences against,	237, 240
RUSH, JUDGE; his charge to the jury, in the case of Smith,	79
SALVAGE. Question of,	600
SEAL. Of the government not recognized by another,	
proves nothing,	543
SEAMEN. Absenting, may be chained,	615
STATE Sovereignty.	561, 607
STATE Rights.	580, 581
STATUTES. Of United States.	
Construction of the act, 3d March, 1819.	205
Construction of the act, 20th April, 1818. sec. 3.	232
Of the act of 1822, South Carolina entitled, "an act for the better regulation of free negroes, and persons of colour, &c."	56
Of the act for the prevention of fires in the city of New York, April 9, 1823.	74
Of the act in relation to selling goods at auction in New York, passed 15th of April, 1817.	77
Of the statute law of Pennsylvania, in relation to divorces.	78
Construction of the law in relation to murder in the first degree.	79
Of the act of February 26, 1794. (U. S.) in relation to the enlistment of minors,	525
Of the statute 38 Edw. 3.	534
Of the statute U. S. March 16, 1821. (arrest of an enlisted Soldier.)	541
Of the act concerning navigation, April 18, 1818.	602
Of the act of congress relating to courts martial, 1795. sec. 5	569
STORY J. His decision in Bainbridge's case.	529
SURETY. To keep the peace—difference from surety of good behaviour.	540
THACHER JUDGE. His charge to the jury,	189. 444
Decision in a case of larceny.	511
In a libel case.	437
TILGHMAN J. His decision in Duane's case,	533
In Kosloff's case.	621
TILLOTSON. His remarks in Gourlay's case.	102
THOMPSON. C. J. His charge to the jury in case of libel.	360
TRACY. Indicted for a libel.	356
TREASON. Case of.	477

What acts amount to.	485
When an act amounts to treason, it involves the intent.	485
TRUTH. On indictment for a libel when may be given	
in evidence (Mass.)	437
(Virginia.)	461
VESSELS. Fitting out and arming of.	234
Must be armed as well as fitted out.	234
May be <i>built</i> and <i>sold</i> to belligerents if not <i>armed</i> .	235
WARRANT; a, under the act of congress, 20th April, 1818, sec. 3, need not be issued by the request of the president, or any officer; a private citizen may demand it.	234
WASHINGTON. His charge to the jury, in Wood's case; and his decision in Wood's case, on motion, in arrest of judgment,	335, 340
WITNESS. Where a witness is subpoenaed, and attached by the defendant, if called, and examined by the plaintiff, he is considered as his witness,	151
When need not swear positive,	247
A witness who has been convicted of a felony, and suffered the judgment of the law, may, any time afterward, be restored to competency by a pardon,	451
What credit to be given to him,	451
J. V. N. YATES, RECORDER; his decision under the act, March 16, 1812, in relation to the arrest of a person enlisted in the service of the United States,	541

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